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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 346

STATE OF NEW YORK AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellants,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Civil Docket #3832

STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

Petitioners,

vs.

UNITED STATES OF AMERICA,

Defendant,

and

INTERSTATE COMMERCE COMMISSION AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Intervenor-Defendants.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, petitioners-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the District Court entered in this cause on June 6, 1951.

Opinion Below

The opinion of the District Court for the Northern District of New York was rendered on April 20, 1951 and is not yet reported. A copy of the opinion-decision and the final decree entered on June 6, 1951 are attached hereto as Appendices A and B, respectively.

Jurisdiction

The final decree of the District Court was entered on June 6, 1951. A petition for appeal is presented to the District Court herewith, to wit, on July 30, 1951. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by the following statutory provisions:

U.S.C. Title 28, Section 1253 (Act of June 25, 1948, c. 646, 62 Stat. 926);
U.S.C. Title 28, Section 2101 (b) (Act of June 25, 1948, c. 646, 62 Stat. 961, as amended May 24, 1949, c. 139, Section 106, 63 Stat. 104);
U.S.C. Title 28, Section 2284 (Act of June 25, 1948, c. 646, 62 Stat. 968);
U.S.C. Title 28, Section 2321 (Act of June 25, 1948, c. 646, Section 1, 62 Stat. 969, as amended May 24, 1949, c. 139, Section 115, 63 Stat. 105);
U.S.C. Title 28, Section 2322 (Act of June 25, 1948, c. 646, 62 Stat. 969);
U.S.C. Title 28, Section 2325 (Act of June 25, 1948, c. 646, 62 Stat. 970);
U.S.C. Title 28, Section 1336 (Act of June 25, 1948, c. 646, 62 Stat. 931).

The following decisions sustain the jurisdiction of the Supreme Court to review the final decree on direct appeal in this case:

United States v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236;

North Carolina v. *United States*, 325 U.S. 507;
United States v. *Hancock Truck Lines, Inc.*, 324 U.S. 774;
Florida v. *United States*, 282 U.S. 194.

Questions Presented

1. Whether the order of the Interstate Commerce Commission dated December 12, 1950 was supported by proper ultimate and preliminary findings on the material issues as required by Section 8(b) of the Federal Administrative Procedure Act (5 U.S.C. § 1007) and the decisions of the Supreme Court of the United States (*Florida* v. *United States*, 282 U.S. 194, 215).

2. Whether the finding of the Interstate Commerce Commission that the New York intrastate commutation fares charged by the New York, New Haven and Hartford Railroad Company caused undue and unreasonable advantage to and preference of persons and localities in intrastate commerce in the State of New York and undue and unreasonable disadvantage and prejudice to persons and localities in interstate commerce between stations in the States of Connecticut and New York, was supported by proper preliminary findings and substantial evidence.

3. Whether the finding of the Interstate Commerce Commission that the New York intrastate commutation fares charged by the New York, New Haven and Hartford Railroad Company caused undue and unreasonable and unjust discrimination against interstate commerce, was supported by proper preliminary findings and substantial evidence.

The Statute of a State or the Statute or Treaty of the United States, the Validity of Which Is Involved

The validity of a statute of a State or of a statute or treaty of the United States is not involved.

Statutes Involved

Section 13(3) and (4) of the Interstate Commerce Act (Act of February 28, 1920, c. 91, § 416, 41 Stat. 484; Title 49 U.S.C. § 13(3) and (4)) and Section 8 of the Federal Administrative Procedure Act (Act of June 11, 1946, c. 324, § 8, 60 Stat. 242, 5 U.S.C. § 1007) are set forth in Appendix C hereto.

Statement

The appellee, the New York, New Haven and Hartford Railroad Company, provides commutation service into and out of Grand Central Terminal in New York City, intrastate within the State of New York and interstate between the States of New York and Connecticut. On September 5, 1947 the Interstate Commerce Commission authorized increases in the interstate commutation fares charged by said company. Thereafter, said company sought authority from the New York Public Service Commission to make the same increases effective for intrastate commutation travel in New York State. On June 25, 1949 the New York Commission authorized interim increases of approximately one-half the increases theretofore authorized for interstate commutation travel by the Interstate Commerce Commission.

During the pendency of the rate proceeding before the New York Commission, New Haven instituted a proceeding before the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act seeking an order directing it to increase its New York intrastate commutation fares so as to make them uniform for the same distances with its interstate commutation fares, claiming that the lower New York fares caused both of the two types of discrimination prohibited by Section 13(4) of the Inter-

state Commerce Act. Hearings were held before the Interstate Commerce Commission in said proceeding and on or about May 1, 1950 a proposed report was issued recommending that a Section 13 order, as prayed for by New Haven, be issued. Exceptions to said report were filed on behalf of the New York Commission claiming, among other things, that the report failed to conform to the requirements of the Federal Administrative Procedure Act. Such exceptions were overruled by the Interstate Commerce Commission. Thereafter, and on October 9, 1950, a report of the Interstate Commerce Commission was issued finding that the New York intrastate commutation fares caused the two types of discrimination prohibited by Section 13(4) of the Interstate Commerce Act and that an order should be issued directing New Haven to increase such fares so as to make them uniform with its interstate fares for the same distances. The New York Commission filed a petition for reconsideration with the Interstate Commerce Commission. Such petition was denied and an order issued by the Interstate Commerce Commission on December 12, 1950 directing New Haven to increase on or before February 1, 1951 its New York Intrastate commutation fares to make them uniform with its interstate commutation fares for the same distances.

On December 22, 1950 the State of New York and the Public Service Commission of the State of New York, as petitioners, instituted pursuant to Section 1336 of Title 28 U.S.C. a proceeding in the United States District Court for the Northern District of New York, naming the United States of America as defendant, for the purpose of annulling and enjoining enforcement of the order of the Interstate Commerce Commission dated December 12, 1950. The Interstate Commerce Commission and the New Haven in-

tervened as defendants. A three-Judge Court was convened and heard the cause on January 17, 1951. On April 20, 1951 the opinion-decision of the District Court was rendered denying the relief prayed for in the petition and on June 6, 1951 a final decree denying said relief and dismissing the proceeding was entered.

The Questions Are Substantial

The major issues above enumerated under the heading "Questions Presented" are substantial.

The Federal Administrative Procedure Act, Section 8, requires the rendition of a proposed report containing findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law or discretion presented. Parties are also given the right to file exceptions to the proposed report and the Interstate Commerce Commission is required to rule upon each such exception presented. The proposed report rendered herein failed to make findings upon all of the material issues presented and was so vague and indefinite as to deprive the New York Commission of an opportunity to file and be heard on exceptions to a proposed report which conformed to the requirements of the Federal Administrative Procedure Act. Likewise, the report of the full Commission dated October 9, 1950 failed to make proper findings upon the material issues presented by the record, together with the reasons and basis therefor, as required by said Act and the decisions of this Court (*North Carolina* v. *United States*, 325 U. S. 507, 510-511; *Florida* v. *United States*, 282 U. S. 194, 215).

The order of the Interstate Commerce Commission dated December 12, 1950 directing an increase in New Haven's New York intrastate commutation fares purports to be based in part upon a finding that the lower New York fares

caused undue and unreasonable advantage to and preference of persons and localities in intrastate commerce in the State of New York, and undue and unreasonable disadvantage and prejudice to persons and localities in interstate commerce between stations in the States of Connecticut and New York. The report of the Interstate Commerce Commission dated October 9, 1950, which contains said finding, cites no facts or circumstances or preliminary findings which would support the same. The only facts and circumstances in the record which might be claimed to support such finding are (1) the disparity between the interstate and New York intrastate commutation fares, and (2) the circumstance that a small percentage of New York intrastate commuters traveled in the same trains with interstate commuters into and out of Grand Central Terminal. Such circumstances are insufficient to support such a finding under the decisions of this Court (*North Carolina* v. *United States*, 325 U. S. 507, 512-514).

There was not substantial evidence in the record to support the finding of the Interstate Commerce Commission that the New York intrastate commutation fares caused undue, unreasonable and unjust discrimination against interstate commerce. In this case, such a conclusion would have to be supported by an affirmative finding based upon substantial evidence that the circumstances and conditions surrounding the transportation of New York intrastate commuters and interstate commuters in and out of Grand Central Terminal were substantially similar since the record does not contain evidence of the operating results of both classes of commutation service (*Illinois Commerce Comm.* v. *United States*, 292 U. S. 474, 483-4).

In this case the uncontroverted evidence not only failed to show that the circumstances and conditions surrounding

New York intrastate and Connecticut-New York interstate commutation traffic were substantially similar but affirmatively showed that such circumstances and conditions were substantially dissimilar from a cost and service viewpoint. Furthermore, the dissimilarities shown by the evidence were such that the circumstances and conditions surrounding New York intrastate commutation traffic were more favorable to New Haven from a cost viewpoint since the Connecticut-New York interstate commuters were furnished with superior and more costly service.

In all previous decisions of the Interstate Commerce Commission in proceedings under Section 13 of the Interstate Commerce Act, such Commission has either made an affirmative finding that the circumstances and conditions surrounding interstate and intrastate traffic were substantially similar or found that the dissimilarities were such that the circumstances and conditions surrounding intrastate traffic were less favorable to the carrier than those surrounding interstate traffic (See e.g. *Increases in Alabama Freight Rates and Charges,* 272 I.C.C. 439, 469; *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.,* 186 I.C.C. 157, 189, 292 U. S. 1).

In a case such as this where there is not substantial evidence to support an affirmative finding that the circumstances and conditions surrounding interstate and intrastate traffic are substantially similar, the fair contribution to be made by the intrastate traffic towards the revenues of the carrier cannot be measured or tested by the amount of revenue which would be produced by increasing the fares for such traffic to the interstate level. Since in this case the uncontroverted evidence showed that the circumstances and conditions surrounding the two classes of traffic were not only dissimilar but that those surrounding the New

York intrastate traffic were more favorable to New Haven from a cost viewpoint, it would be necessary to measure or test such fair contribution by a comparison of the operating results of both classes of traffic. The record does not show the operating results of the carrier's interstate commutation traffic as a whole or of its Connecticut-New York interstate commutation traffic.

The issues herein are not only substantial but unique insofar as our research discloses, in that no reported decisions of the Courts in any case involving a review of an order of the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act involved a case where, as here, the record not only failed to show that the circumstances and conditions surrounding the interstate and intrastate traffic were substantially similar but that the dissimilarities were such that the circumstances and conditions surrounding the intrastate traffic were more favorable to the carrier.

The action of the Interstate Commerce Commission under the peculiar facts and circumstances of this case amounts to a direct regulation of New York intrastate commutation fares to compel uniformity of such fares with interstate fares for the same distances. No such power has been conferred upon said Commission by the Interstate Commerce Act or any other statute (*North Carolina* v. *United States,* 325 U. S. 507, 510-511).

We believe that the questions presented by this appeal are substantial and that they are of public importance since they involve the primary jurisdiction of the Public Service Commission of the State of New York to regulate intrastate commutation fares to be charged by the New York, New Haven and Hartford Railroad Company for commutation

travel in the State of New York by approximately 18,000 residents of such State.

Dated July 30, 1951.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, Petitioners,

vs.

UNITED STATES OF AMERICA, Defendant,

and

INTERSTATE COMMERCE COMMISSION AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Intervenor-Defendants

Action to Annul Order of Interstate Commerce Commission.

Before:

Charles E. Clark, United States Circuit Judge, J. Joseph Smith, United States District Judge, Stephen W. Brennan, United States District Judge.

Constituting a Statutory United States District Court.

Appearances:

Hon. Nathaniel L. Goldstein, Atty. General State of New York, Capitol, Albany, New York.
Mr. Samuel A. Hirschowitz, Asst. Attorney General.

For Petitioner, State of New York:

Hon. Sherman C. Ward, Acting Counsel Public Service Commission, Albany, New York.
Mr. Joseph J. Doran, Assistant Counsel.
Mr. Samuel R. Madison, Special Attorney.

For Petitioner, Public Service Commission:

Mr. William D. McFarlane, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.
Hon. Irving J. Higbee, United States Attorney, Federal Building, Syracuse, New York.

For Defendant, United States of America:

Mr. J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C.

For Intervenor-Defendant, Interstate Commerce Commission:

Mr. Edward R. Brumley, General Counsel, New York, New Haven and Hartford Railroad, Grand Central Terminal, New York, N. Y.

For Intervenor-Defendant, New York, New Haven and Hartford Railroad Company:

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For town of Pelham:

Brennan, Judge.

OPINION-DECISION

This proceeding challenges the validity of a report of the Interstate Commerce Commission, dated October 9, 1950, and an order entered thereon on December 12, 1950.

For convenience the Public Service Commission of the State of New York will be referred to as the "P.S.C.", the Interstate Commerce Commission as the "I.C.C.", and the New York, New Haven and Hartford Railroad Company as the "New Haven."

The order of the I.C.C. sought to be annulled requires the New Haven to increase its New York intrastate commutation fares so that they will become uniform with its interstate commutation fares for the same distances. The order complained of became effective February 1, 1951. An application to this Court for a temporary injunction restraining the enforcement of the order was denied upon the condition that the excess fares collected by the New Haven pending the final determination of this proceeding be impounded in such a manner that they could be returned to the commuters in the event that the order was finally determined to be invalid.

The New Haven is an interstate railroad carrier providing regular passenger and freight service in the States of New York, Connecticut, Rhode Island and Massachusetts. Generally speaking, its principal passenger terminals are Boston on the north and New York City on the south. Its passenger service produces about 41% of its total operating revenues and is accountable for about 48% of its operating expenses. Its commutation service is a substantial item of both revenue and expense in its total operation.

Geographically the order involves commuters' transportation rates on the New Haven line over a distance of about twenty-six miles from the Grand Central Station at New York City. It applies to nine stations wholly within the State of New York, the most distant from the Grand Central terminal being that for the City of Port Chester.

The order in question is referred to in the proceeding as a Section 13 order and the authority therefor is found in Section 13 (3) and (4) of the Interstate Commerce Act. (49 U.S.C.A. 13 (3) and (4).[1] The controversy involves

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[1] "(3) Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation services, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this title.

"(4) Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the

a subject matter of which the State of New York has the primary jurisdiction, and the I.C.C. has jurisdiction only for the purpose of removing discriminations referred to in the statute. There is, therefore, underlying this proceeding the question of the powers of the federal and state agencies and the general policy of comity between them. With these facts in mind it is deemed advisable to summarize the history of the rate-making of commutation fares as applicable here.

Since 1925 commutation fares have been on a uniform basis. This result was obtained after an investigation by the I.C.C. and regulatory authorities in the States of Connecticut, New York, Massachusetts and Rhode Island. (101 I.C.C. 703). This basis so far as pertinent here applied to a 60-ride ticket, good for thirty days from its date and otherwise unrestricted as to its use. Such uniformity existed except for a period from February 10, 1942 to May 14, 1943, during which time such fares were increased 10% following the Commission's order of January 23, 1942. About September, 1947, in a proceeding before the I.C.C. (269 I.C.C. 87), a 46-ride trip restricted commutation ticket, not valid on Saturdays, Sundays or holidays, was authorized. Fare increases were ordered in the 60-trip unrestricted and 46-trip restricted commutation tickets of 25% and 15% respectively. After the filing of the required tariffs by the New Haven with the P.S.C. that body suspended the operation thereof, and instituted an investigation. On March 6, 1948, the New Haven filed its petition under Section 13 of the Act, and requested that the I.C.C. make effective for intrastate traffic within the State of New York the inter-

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one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

state commutation fares found reasonable and established between stations in Connecticut and stations in New York. (269 I.C.C. 87). On June 2, 1948, the P.S.C., by decision, cancelled the New Haven's intrastate tariff filed in September, 1947. The New Haven requested the P.S.C. to reopen the case and receive additional evidence. Hearings were held, and the P.S.C. by interim decision found the New Haven was entitled to temporary increases of 18% and 6% on the unrestricted and restricted commutation tickets respectively. Such interim rates were established for a limited period, but have been extended by order of the P.S.C. and they are now in force so far as the P.S.C. is concerned, although no final decision has been rendered. The I.C.C., after adjourning its hearings to permit the P.S.C. to complete its investigation, resumed its hearings under the Section 13 petition, which was amended to put in issue the interim rates above referred to, and the P.S.C. took part therein. The hearings involved the taking of a considerable amount of testimony and the consideration of several exhibits. A cost study was prepared by the New Haven and submitted to the P.S.C. and to the I.C.C. in the proceedings under discussion.

On October 9, 1950, the I.C.C. rendered its decision, finding in substance that the monthly commutation fares imposed by the P.S.C. for intrastate travel between stations on the New Haven line within the State of New York cause, and unless increased by 25% in connection with the unrestricted tickets and 15% in connection with the restricted tickets over the fares in effect on July 8, 1949, will continue to cause undue and unreasonable advantage to and preference of persons and localities in intrastate commerce in the State of New York, and undue and unreasonable disadvantage and prejudice to persons and localities in interstate commerce between stations in the States of Connecticut and New York, and undue, unreasonable and unjust discrimination against interstate commerce; all in violation of Paragraph 4 of Section 13 of the Interstate Commerce Act. The P.S.C. on November 10, 1950, filed with the I.C.C. its petition for reconsideration of its decision. The petition was denied on December 12, 1950, and the I.C.C. issued its order directing the New Haven to establish the fares

above described on or before February 1, 1951. This action instituted December 22, 1950, followed.

There seems to be no dispute between the parties as to the power afforded the I.C.C. by the statute to fix interstate rates to remove discriminations against persons or localities and discriminations against interstate commerce, provided that either or both such discriminations are found to exist as a fact; such findings having a basis in substantial evidence. The question here resolves itself to a determination as to whether or not the I. C. C. made the requisite clear findings of fact to support the order, and whether such findings have a substantial basis in the evidence.

We pass logically to a consideration of the general principles afforded by the statutes and judicial precedence which serve as a guide to our determination. The parties are not in conflict as to such principles, but as is usual in this type of case, it is their application to the particular facts of the case which is the real crux of the controversy. Only brief reference then will be made thereto.

As stated above, the authority of the I. C. C. is based upon the provisions of the Interstate Commerce Act, Sec. 13 (3) and (4), (49 U. S. C. A. 13 (3) and (4)). Such authority resulting as here in the nullification of the rates prescribed by the P. S. C. must be based upon "* * * clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission." (North Carolina v. U. S., 325 U. S. 507). That this Court will not weigh the evidence and that its function is limited is consistently recognized. (Florida v. U. S., 292 U. S. 1 at 12). The Court's judgment is not to be substituted for that of the Commission.

The discrimination found here against the Connecticut residents involves the relation of the interstate and intrastate rates to each other. The discrimination found against interstate commerce involves the relation of rates to income. (Florida v. U. S., 282 U. S. 194 at 214). Under either or both findings the I. C. C. must determine that the interstate rates are reasonable. (Georgia Comm. v. U. S., 283 U. S. 765 at 770). The same case, however, is authority also for the holding that rates found to be reasonable need not be

reconsidered in the absence of a showing of a change of conditions.

With the above facts and principles in mind an approach is made to an analysis of the contentions of the litigants and a legal appraisal thereof in the light of facts disclosed in the record.

The attacks made upon the Commission's findings come substantially to these points: a general contention of vagueness and lack of specific content in the findings as a whole; an attack upon the finding of similarity of the service rendered the New York and Connecticut commuters; and an attack upon three specific details relating to revenue and expense, viz: the charge made for the Harlem tolls expense payable by the New Haven to the New York Central; the failure of the New Haven to allocate as revenue the receipts of Grand Central's rentals above ground, and the use of the "group method" of ascertaining costs as against the "train by train" method.

As to the general contention of vagueness in the findings, it is evident that some findings do tend to generalities, and that improvement thereon could be made. Experience indicates that to exert pressure for such strivings toward perfection usually results in a piling on of more words without essential change in substance. The criticism loses its force when the report is read as a whole. It shows without doubt what the Commission thought and did, and thereby the real function of findings is served.

The finding as to the similarity of service seems to be based upon evidence that appears to be substantially undisputed. Interstate and intrastate commuters make use of the same rails and terminals in their journey, but it is clear, and indeed conceded, that the intrastate equipment is not only different in detail but older and more antiquated; much of the controversy turns upon that fact. The intrastate commuters generally travel in multiple unit trains making local stops within the state. The coaches are not air-conditioned; have a seating capacity of 120 passengers and have a seating arrangement whereby three passengers occupy the seat on one side of the aisle and two on the other. The interstate passengers generally travel in air-conditioned coaches, having a smaller seating capacity. Gener-

ally local stops are not made within the State of New York. Eighty-one per cent of such commuters ride in such trains, while eighteen and nine-tenths per cent ride with the intrastate commuters in the multiple unit trains. The report of the I. C. C. finds that the difference in the quality and value of the service as between the respective hauls is recognized in the commutation rates, both interstate and intrastate, except in New York. Nevertheless, it declined to hold the discrimination in rates, which it found, offset by these differences in type of service rendered.

The petitioners' point as to the service rendered comes to this: that since the equipment used by intrastate commuters is so poor, aged and outworn, the New Haven should, therefore, give a reduction in the fare charged. There is no contention that the service is inadequate, and there is no particular claim of untidiness, inconvenience or discomfort. The P.S.C. seems to pay no attention to the peculiarities and extra difficulty of the New York commuter traffic, notably that it must be taken care of quickly at the two peaks—incoming in the morning and outgoing at night. The need of having available the personnel, rolling stock and other equipment to take care of unusual traffic at two periods of the day, remaining substantially idle otherwise, presents questions of costs, as well as of executive management, not faced by petitioners. It is not shown that this economic burden could be met, or could be better met, than by the kind of disposition of facilities actually made. Moreover, the practical inconvenience to the commuters was not convincingly shown. It would seem fairly obvious that the cars with the three-two seating arrangement were more desirable, from the practical as well as economic standpoint, for the kind of traffic than would cars having a double or single seating arrangement. No one would consider the use of the latter type of cars to handle Manhattan's subway traffic, which is comparable to the intrastate commuters traffic on the New Haven. The objections seem to come down to injuries to the esthetic sensibilities of the commuters, save perhaps as to the absence of air-conditioning, which is hardly necessary in the short runs involved. In any event, all of this should be made the subject of a

direct appeal for adequate service by the P.S.C. rather than a lowering of rates.

When similarity exists is a question of fact. The term denotes a general likeness, an approximation, something less than absolute identity. Its existence is determined by the facts as applied to railroad transportation, and as laymen we would hesitate to reverse a finding made by an expert body whose experience with the use and meaning of the term lends added weight to its findings.

Each of the three remaining items; to-wit, Harlem tolls expense, Grand Central Terminal expenses and the "group method" of ascertaining costs as against the "train by train" method is in fact involved as a part of the accounting methods used in determining costs. In the cost study before the I.C.C. the New Haven charged the New York commutation service approximately $50,000 as an expense for its use of the Grand Central Terminal. No credit was given for the rents received from structures erected on the street level and used for non-operating purposes. The P.S.C. claims that there should be deducted or credited to the expense item about $24,000, on account of such ground rents. The Harlem tolls expense is an item payable under an agreement made in 1848 for use by the New York Central of certain trackage owned by the New York and Harlem Railroad. The commutation service of the New Haven travels over such trackage, and the cost study charges about $40,000 per month as an expense of commutation service. The P.S.C. claims it is overstated by about $12,000. In its cost study the New Haven used the "group method" of ascertaining costs. Same is based upon the cost for passenger mile on all trains studied. The P.S.C. re-assembled such data on a "train by train" basis, and urges that it results in a decrease in the cost of the intrastate commutation service by about $24,000, the computations on all three items being upon a monthly basis.

The above matters are essentially matters of accounting, and are peculiarly within the province of the expert rate-making bodies. That the P.S.C. and the I.C.C. disagreed as to these items is not justification for this Court to constitute itself as expert in accounting methods. To do so

would in effect be to transfer the rate-making power from the state and federal agencies, created by law, to the courts, which the appellate courts have many times stated may not be done. Such items as density of traffic, train loads, allocations of revenue and expense are all problems involved in the above items. If such items have been considered and evaluated by the I.C.C. and applied in accordance with the principles of law, its conclusion must be final.

It affirmatively appears in the report that such items were in fact considered by the I.C.C. Some four typewritten pages of the report is devoted to these items. Briefly stated, the I.C.C. found that petitioners' contention that the trackage or Harlem tolls expense should be based on a cost-sharing basis instead of the actual contract basis was rejected, and the method appearing in the cost study "—is reasonably associated with the elements which occasioned such costs."

The expense to the New York Central was settled by contract with the New Haven in 1848 and implemented by arbitration settling the rates in 1861. At this late day no court can certainly venture, in an indirect proceeding, to say that the intercompany arrangements standing for one hundred years are to be brushed aside. So, the New Haven must now pay the charge in any event; the only question for us is how to apportion it fairly among different commuter groups or other patrons of the road. Hence, in fixing rates for the New York commuters there should be a proper allocation of a charge for the Harlem line tolls, and the issue comes down to a dispute as to the proper railroading method, whether on the basis of allocated costs per train or passenger miles of use. The latter, which is the one used by the Road, would seem quite reasonable, or at least as reasonable as the former, claimed by the New York Commission. Certainly we can not reject it as legally unsound.

The question of the Grand Central area rents is perhaps a little more difficult. But that is because it is an even more technical question rather than that we have the more basis for setting aside the professional view which is brought to us. The problem is an interesting one for railroad accountants. Of course, the land and buildings in the

Grand Central area are most valuable, and the New Haven road receives a portion of the return of this land increment under its arrangements with the New York Central. It does not allocate any of this on its rate-making or specifically in computing the New York commuting rates in issue. It does employ the funds upon its fixed charges account, thus using the receipts to pay such necessary obligations as interest on bonds, etc. Fixed charges existing, it is obviously necessary that funds for their payment be reserved; if therefore a portion of the rentals are to be allocated to income in fixing the New York commuter rates, then there must be added a proper charge as a contribution to the payment of these obligations. Petitioners do not present anything on this, and as it stands, we think we have no basis for readjusting these charges.

The contention that the study should follow the "train by train" method rather than the "group" method is in substance rejected by the statement that such a method credits commutation service on the heavily patronized peak-hour trains, thereby obtaining the benefits of density without charging the service with the higher cost occasioned by such density. The report summarized the plaintiff's contentions in regard to the items of cost study, and states that applying same in a conservative aspect the New Haven's costs can in no event be said to be overstated by more than $42,000, and that with such favorable treatment, the intrastate commutation fares in New York are non-compensatory to maintain the interstate system of the New Haven. The importance of this statement, which does appear conservative, lies in its demonstration that petitioners must succeed on practically every point to make a convincing showing of the need of injunctive relief; success on one or even two of the accounting issues will not justify the over-turning of the order of the I.C.C. Since we are not convinced of the showing on any one of the points, we are constrained to find against the petitioners.

The plaintiff leans heavily upon the case of North Carolina v. U. S., supra, as authority for its contentions. The order in that case was state-wide in its scope and affected rail carriers who were already operating at an unusual

profit. The court held there that a single finding that interstate passengers paid a higher fare than intrastate passengers for the same facilities was inadequate to support an order nullifying state-authorized rates upon a finding of prejudice to interstate passengers. It held that a reliance upon the existence of a disparity between the interstate and intrastate rates, in the absence of a finding that the intrastate rate was less than compensatory, was insufficient to sustain an order nullifying state-authorized rates upon a finding of prejudice to interstate commerce. Here we have findings that the intrastate rate is less than compensatory. We also have findings as to relationship of commutation traffic to the total operation. We have a reasonableness of the interstate rates which implies a correct percentage allocation of commutation revenue and expense. We have a finding as to the deficit in operations; all of which would seem to satisfy the deficiency found to exist in the North Carolina case. Substantial evidence to support such findings is clearly in the record, and the finding of discrimination as to interstate commerce is legally justified.

Since discrimination against interstate commerce is sufficient to sustain the order, we need not consider the further question as to the lawfulness of the order insofar as it finds discrimination between localities and between persons. It is sufficient to say that the findings made by the I.C.C. as they apply to discrimination against interstate commerce are adopted as the findings of this Court.

We conclude that the Court has jurisdiction of the parties and the subject matter; that the order of the I.C.C. be affirmed; and that the complaint be dismissed.

April —, 1951.

CHARLES E. CLARK,
United States Circuit Judge.

J. JOSEPH SMITH,
United States District Judge.

STEPHEN W. BRENNAN,
United States District Judge.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 3832

STATE OF NEW YORK and the PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Defendant*

JUDGMENT

This cause came on to be heard on January 17, 1951, on both the temporary restraining order and on the merits, challenging the validity of a report of the Interstate Commerce Commission dated October 9, 1950, and an order entered thereon on December 12, 1950; and the Court constituting a special District Court of three judges convened pursuant to 28 U. S. C. 2284 and 2325, and being heard upon the evidence taken before the Interstate Commerce Commission and the Report of the Commission, as well as upon the oral arguments and briefs of counsel, and the Court being fully advised in the premises.

NOW, THEREFORE, for the reasons set forth in the opinion of the Court heretofore filed, it is Ordered, Adjudged and Decreed that the injunction and other relief prayed for in the complaint be denied and that the suit be dismissed.

This the 5th day of June, 1951.

CHARLES E. CLARK,
United States Circuit Judge.
J. JOSEPH SMITH,
United States District Judge.
STEPHEN W. BRENNAN,
United States District Judge.

APPENDIX C

(Act of February 28, 1920, c. 91, § 416, 41 Stat. 484; Title 49 U. S. C. § 13(3)(4))

§ 13. Complaints to and investigations by commission

* * * * * * *

(3) Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this title.

(4) Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign

commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

(Act of June 11, 1946, c. 324, § 8, 60 Stat. 242, 5 U. S. C. § 1007)

§ 1007. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

(a) In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 1004 of this title, any other officer or officers qualified to preside at hearings pursuant to section 1006 of this title) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having pre-

sided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil No. 3832

STATE OF NEW YORK AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from a final decree, entered June 6, 1951, by a specially-constituted District Court of three judges pursuant to 28 U.S.C., sections 2284 and 2325, dismissing appellants' petition to set aside an order of the Interstate Commerce Commission.[1] Appeal was allowed on July 30, 1951, and appeal papers were served on appellees on August 1, 1951.

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[1] The court, consisting of Circuit Judge Charles E. Clark and District Judges J. Joseph Smith and Stephen W. Brennan, rendered its opinion on April 20, 1951.

The order, entered December 12, 1950, in No. 30010, *New York State Commutation Fares, New Haven Railroad,* 279 I.C.C. 151, directs the New York, New Haven & Hartford Railroad Company (hereinafter called "New Haven") to increase its New York intrastate commutation fares between New York, N. Y., and nine stations on its line in the State of New York to the level found reasonable for similar interstate commutation fares applying between New York, N. Y., and stations on the New Haven in Connecticut. The order was made pursuant to section 13 (3) and (4) of the Interstate Commerce Act (41 U.S.C., sec. 13 (3) and (4)).

Background and Nature of the Proceedings

Having operated at a deficit of over $6,000,000 in 1946, and faced with an estimated deficit of $7,125,000 in 1947, on the basis of its then prevailing rates, the New Haven early in 1947 applied to the Commission for authority to raise its standard interstate passenger fares and, also, its interstate commutation fares.

In *Increased Passenger Fares, New Haven Railroad,* 268 I.C.C. 303, April 8, 1947, the Commission authorized the increases sought in the standard passenger fares, finding increases from 2.2 to 2.5 cents per mile in coaches and from 3.3 to 3.5 cents in pullmans to be just and reasonable. Five months later, in *Increased Passenger Fares, Eastern Railroads,* 269 I.C.C. 87, the Commission authorized in part the increases sought in the New Haven's commutation fares. For many years this carrier had issued 60-trip monthly commutation fares on

a low basis averaging about one cent a mile. The Commission approved an increase in these fares of 25%, and, in consideration of the general adoption of a five-day work week, prescribed a new type of monthly commutation ticket covering 46 trips but not good on Saturdays, Sundays or holidays, at a fare 15% higher than the previously existing fare for the 60-trip ticket.

Previously, the New Haven, in common with other railroads of the country, had petitioned for and been granted an increase of 20% in freight rates, which became effective January 1, 1947. The New Haven, however, is unique among the large railroads of the country in that about 50% of its operating revenues and expenses are related to its passenger-train services. As a result, the freight increase of January 1, 1947, yielded it an increase of only about 10% in total operating revenues (268 I.C.C., p. 304). The Commission found in both of the above-cited reports authorizing passenger fare increases that the increased fares would be just and reasonable for the future and that they "are necessary in order that the travel thereunder may make a fair contribution to the revenues needed by the New Haven to enable it, under honest and efficient management, to provide adequate and efficient service, at the lowest cost consistent with the furnishing of such service, to meet the needs of commerce, the Postal Service, and the national defense" (268 I.C.C. 308).[2]

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[2] These findings were responsive to section 15a of the Interstate Commerce Act (49 U.S.C. § 15a) and the National Transportation Policy (54 Stat. 898-899; 49 U.S.C., notes preceding secs. 1, 301, 901, 1001). See *McLean Trucking Co.* v.

The Commission further found in the last cited report that the increased commutation fares of the New Haven "will yield a substantial increase in revenue" of which the New Haven is "in need" and to which it is "justly entitled," and that they are as low as the New Haven "can be required to maintain from a cost standpoint" (269 I.C.C. 102). The New Haven's new commutation fares for both the 60-trip and the 46-trip tickets became effective on interstate traffic September 18, 1947, and on the same date, under permission of the authorities of Massachusetts, Rhode Island, and Connecticut, they became effective on intrastate traffic in those states. The New Haven sought similar authority from the New York Commission, which was refused by a report dated June 2, 1948.

After the proceedings before the New York Commission had been pending for nearly six months, the New Haven petitioned the I.C.C. on March 6, 1948, for relief under section 13 (4) of the I.C. Act. The I.C.C. however, took no immediate action on the petition. On June 7, 1948, the New Haven, adverting to the refusal of the New York Commission on June 2, 1948, to approve its new tariffs, requested the I.C.C. to institute the section 13 proceeding sought in the petition of March 6, 1948. On June 22, 1948, the I.C.C. entered an order instituting the requested proceeding. A hearing was held before an examiner on July 26, 1948, and substantial evidence was introduced. During that hearing the examiner sug-

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United States, 321 U.S. 67, 80-84; *Texas* v. *United States*, 292 U.S. 522, 530-531; *Schwabacher* v. *United States*, 334 U.S. 182; *Seaboard Air Line* v. *Daniel*, 333 U.S. 118; *I.C.C.* v. *Parker*, 326 U.S. 60, 66-68.

gested that the New Haven submit evidence showing the cost of its commutation service in New York. Later, the New York Commission requested that such cost evidence be submitted to it initially. The New Haven agreed to do so, and on August 25, 1948, the I.C.C. postponed indefinitely the date for its further hearings.

Thereafter the New York Commission conducted further hearings at which substantial cost evidence was submitted, and, on June 29, 1949, it rendered a second report and order authorizing increases for an "interim" period. Said order allowed an 18% increase on the 60-trip ticket and authorized a 46-trip restricted ticket at a figure 6% higher than the prior 60-trip fare.[3] These increased fares became effective July 9, 1949.

Thereafter the New Haven, on October 21, 1949, amended its section 13 petition to the I.C.C. so as to bring in issue, also, these increased interim fares prescribed by the New York Commission. Further hearings were held before the I.C.C. in December 1949. After submission of briefs, issuance of an examiner's proposed report, filing of exceptions thereto and replies to the exceptions, oral argument was had before the Commission. On October 9, 1950, the Commission rendered a report containing its findings of fact and conclusions in the premises. *New York State Commutation Fares, New Haven Railroad,* 279 I.C.C. 151.

The Commission found (Fng. No. 7) that the intrastate fares cause (a) undue and unreasonable advantage to and preference of persons and locali-

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[3] As compared to 25% and 15% increases, respectively, which had been authorized by the I.C.C. on interstate travel.

ties in intrastate commerce in the State of New York and undue and unreasonable disadvantage and prejudice to persons and localities in interstate commerce between stations in the State of Connecticut and New York; and (b) undue, unreasonable and unjust discrimination against interstate commerce, in violation of section 13(4) of the Interstate Commerce Act.[4]

In Finding No. 8 the Commission found that "such advantage, preference, disadvantage, prejudice and discrimination can and should be removed by establishing for intrastate travel within the State of New York fares arrived at by adding to the fares in effect on July 8, 1949, 25 percent in connection with the unrestricted tickets and 15 percent in connection with the restricted tickets, the resulting fares to and from New York City being set forth under the heading Proposed in Appendix I hereto."

The Commission did not enter an order contemporaneously with its report, but indicated that it would take no action if the New York Commission would promptly authorize the increase of intrastate fares to the interstate level. The New York Commission did not do so. On December 12, 1950, therefore, the I.C.C. entered the order here involved, requiring the intrastate fares to be adjusted in the manner indicated in Finding No. 8.

Appellants' petition to the district court was filed on December 20, 1950. By order of January 25, 1951, the court denied a motion for an interlocutory injunction, upon the condition that the

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[4] See also the supporting findings, Nos. 1-6 and 8-12, 279 I.C.C. at 162-164.

excess fares collected by the New Haven pending the final determination of this proceeding be impounded in such a manner that they could be returned to the commuters in the event the order is finally found invalid. The court handed down its opinion on April 20, 1951 and entered an order dismissing the petition on June 6, 1951.

The Commission's Authority to Remove Discriminations Against Interstate Commerce

The Interstate Commerce Act confers plenary authority upon the Commission to regulate intrastate rates charged by interstate carriers where those rates cause (1) "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand," or (2) "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." Section 13 (4).[5] Section 13 orders removing discriminations caused by intrastate rates have been repeatedly sustained by this Court.[6] In upholding the Commission's authority in this respect, the Court stated in *Florida* v. *United States* (292 U.S. at p. 5):

> In *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U.S. 563, 585-587,

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[5] See also section 13 (3), 49 U.S.C. 13 (3), relating to investigations involving state regulations.

[6] *Wisconsin Railroad Commission* v. *C., B. & Q. R.R. Co.*, 257 U.S. 563; *New York* v. *United States* 257 U.S. 591; *Georgia Commission* v. *United States*, 283 U.S. 765; *Louisiana Commission* v. *United States*, 284 U.S. 125; *Louisiana* v. *United States*, 290 U.S. 70; *Florida* v. *United States*, 292 U.S. 1; *Illinois Commerce Commission* v. *United States* 292 U.S. 474; *Ohio* v. *United States*, 292 U.S. 498; *Mississippi* v. *United States*, 307 U.S. 610; and *Texas* v. *United States*, 337 U.S. 911.

> we reached the conclusion that the provision of sec. 13(4) for the removal of "any undue, unreasonable, or unjust discrimination against interstate commerce" was not to be regarded as referring only to discrimination as between persons and localities. We held that Transportation Act, 1920, imposed an affirmative duty on the Commission "to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States." Intrastate rates, we said, must play a most important part in maintaining such an adequate system. If there was interference with the achievement of that purpose because of a disparity of intrastate rates as compared with interstate rates, the Commission was authorized to end that disparity. It was to be ended because it constituted an "unjust discrimination against interstate commerce." We concluded that these words in sec. 13(4) were not tautological, but had the necessary effect of conferring authority upon the Commission to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. *United States* v. *Louisiana,* 290 U.S. 70, 75.

Appellants do not appear to question the Commission's authority to remove discriminations against interstate commerce of the kind here found to exist, but contend rather that the Commission's report "cites no facts or circumstances" warranting a finding of discrimination (Statement as to Jurisdiction, p. 7).

The Commission's Finding of Discrimination is Fully Supported by the Record

The Commission found (1) that the intrastate fares were on a lower basis than the interstate fares, resulting in an abrupt jump at the Connecticut border, and (2) that the intrastate fares resulted in undue preference of the New York commuters and localities and undue prejudice to the interstate commuters from Connecticut and localities in Connecticut. It also found that the lower intrastate fares caused unjust discrimination against interstate commerce, and further, that neither the New York intrastate fares in effect prior to July 9, 1949, nor the so-called interim fares effective on that date, produced sufficient revenue to cover the cost of providing the service for such travel, including a reasonable return on the investment properly chargeable to such service. It further found that the increased intrastate fares found reasonable are necessary for the future in order that the travel thereunder may make a fair contribution to the revenue needed by the carrier to meet its increased operating expenses due to increases in wages and in prices of materials and supplies, and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service. These ultimate findings were predicated upon numerous subordinate findings, including the finding that the increases authorized by the New York Commission would result in an increase of about 9%, or $222,500 per annum, as contrasted with 17%, or about $438,600 per annum, that would result if

intrastate fares were increased to the level of the interstate fares and the intrastate fares in the other states where the New Haven operates.

The New Haven's interstate commutation fares, approved as reasonable and authorized by the I.C.C. in a previous proceeding, were found by the I.C.C. in the section 13 proceeding to be just and reasonable for the future. The earlier proceeding was entitled *Increased Passenger Fares, Eastern Railroads,* 269 I.C.C. 87, decided September 5, 1947. The Commission there authorized and approved increases in the interstate commutation fares of the New Haven (as well as those of the Boston & Maine and the Boston & Albany, New York Central, lessee) from all New England points to New York City (as well as to Boston and to other cities to which commutation service is maintained) of 25% for the unrestricted monthly tickets and 15% for the restricted monthly tickets. See Appendix 3, paragraph 9, page 107 of the above-cited report. In that report the Commission found that these interstate commutation fares increased as set forth in said Appendix 3:

> (1) will yield a substantial increase in revenue of which petitioners [including the New Haven] are in need and to which they are justly entitled; (2) are as low as petitioners can be required to maintain from a cost standpoint, and at the same time are reasonably related one to another; (3) are necessary in order that the travel thereunder may make a fair contribution to the revenues needed by petitioners to enable them under honest and efficient management, to provide adequate and efficient service, at the lowest cost consistent with the furnish-

> ing of such service; and (4) will be just and reasonable for the future. (269 I.C.C. 102)

In its report in the case at bar, the Commission found (Fng. No. 10) that there have been no subsequent changes in conditions which would warrant a reduction in the New Haven's interstate commutation fares found reasonable for the future in the aforesaid report, and that such fares will continue to be just and reasonable for the future. Cf. *Georgia Commission* v. *United States,* 283 U. S. 765.

The interstate fares in question, having thus been found reasonable by the I.C.C., constituted the appropriate standard of comparison with the intrastate rates in issue.

The Commission further found that, in general, the circumstances and conditions surrounding the interstate and intrastate transportation are substantially similar. It recognized that there is some difference in the quality of the services rendered, in that some of the interstate trains are of a superior kind. But it noted that the existing interstate rates and the intrastate rates of the New Haven in Massachusetts, Connecticut and Rhode Island (and likewise the new rates here prescribed for New York) adequately compensate for this factor. This results from the fact that the prescribed rates for short hauls (on which less modern equipment is used) are relatively lower than rates for longer runs (on which more modern equipment is frequently used). The report states (279 I.C.C. at 154-155):

> The prior commutation fares of respondent as approved by us and in the four States

traversed by it were somewhat lower than those of the Pennsylvania Railroad Company and somewhat higher than those of the other New Jersey Railroads. See *Commutation Fares on N. Y., N. H. & H. R.R., supra,* [101 I.C.C.] at pp. 713-714. The present commutation fares of respondent as approved by us and in the four States traversed by it, except New York, are generally relatively lower for distances under 40 miles (principally intrastate) and relatively higher for greater distances (principally interstate) than those of such other New Jersey railroads. They are still relatively lower for all distances than those of the Pennsylvania but reflect the same type of graduation for the long-haul commuters as was approved for that line where, as here, the quality of the service was found to be somewhat superior. See *Increased Passenger Fares, Eastern Railroads, supra* [269 I.C.C.] at pp. 91, 96, and *New Jersey-New York Commutation Fares,* 277 I.C.C. 459, 476, 477. Respondent's present intrastate commutation fares in New York being considerably below the basis approved by us and in the other three States traversed by it are far below those of the New Jersey railroads. In connection with the 60-trip ticket, for a difference in distance of 3 miles, as contrasted with a spread of $1.20 under the interstate basis, the lower intrastate basis results in an abrupt jump of $2.29 at the Connecticut-New York border. Respondent's present commutation fares, both interstate and intrastate except in New York, reflect a lesser increase in dollars and cents over the prior fares for distances under 26 miles than for greater distances. They give due recognition to the differences in the quality and value of the service as between the respective hauls.

The Commission made clear findings to the effect that the circumstances and conditions surrounding the interstate and intrastate commutation services in question are substantially similar. In so doing, it took full account of the fact that the average interstate haul is longer than the average intrastate trip, and the further fact that there is superior service on some of the interstate trains.

The Commission found that on each week day the New Haven operates 178 trains in and out of Grand Central Terminal. Sixty-three of these run to and from points east of Stamford, Conn., and carry interstate commuters, but make no local stops in New York. Seventy-six operate to and from Stamford or points east of Stamford and make local stops in *both* New York and Connecticut. Thirty-nine move exclusively in New York State, to and from Port Chester and New Rochelle (279 I.C.C. at 152).

The Commission further found that both the interstate and the intrastate commuters to and from New York City travel in coaches moving largely over the same rails and utilize the same or similar stations at each end of the line; that the intrastate commuters generally travel in so-called multiple-unit trains which make local stops at one or more points in the State, the coaches usually being non-air-conditioned and of the type having three seats on one side of the aisle and two on the other, with a seating capacity of 120 passengers, while the interstate commuters generally travel in air-conditioned trains which do not make local stops in the State, the coaches generally having a considerably smaller seating capacity. But the Commission found that of the interstate commuters, 18.9% ride

side by side with the intrastate commuters in the multiple-unit trains, the remaining 81.1% riding in the stream-lined or other air-conditioned trains (*id.*, p. 153). The record shows the facts in this regard in great detail, containing many photographs showing both exterior and interior views of the coaches used in this commutation service (Ex. 37).

The Commission found, however, that the differences in the quality and value of the service as between the longer and the shorter hauls are compensated by the differences in the fares, those for distances under 26 miles being relatively lower than for the greater distances (*id.*, 154-155). The New Haven's present commutation fares, both interstate and intrastate except in New York, reflect a lesser increase in dollars and cents over the prior fares for distances under 26 miles than for greater distances (*id.*, p. 155).

The finding of the Commission in this regard, Finding No. 1, is as follows (Rept., 162):

> That the circumstances and conditions surrounding the transportation of commutation passengers in intrastate commerce between stations on respondent's line within the State of New York are substantially similar to those surrounding the transportation of commutation passengers in interstate commerce between stations on respondent's lines in the States of New York and Connecticut, except with respect to the average haul and relative service adverted to above, and that these differences in transportation conditions do not justify more favorable treatment with respect to fare increases of the New York intrastate commuters than of interstate commuters and intra-

state commuters in the other three States traversed by respondent.

The Commission also found, upon substantial evidence, that the intrastate commutation fares prescribed by the New York Commission are noncompensatory.

Following the suggestion of the I.C.C. examiner, made at the hearing on July 26, 1948 (R. 67-70),[7] the New Haven made a special study of the costs of its New York intrastate commutation service. This evidence, after having first been presented to the New York Commission, and ruled upon in its report of June 29, 1949,[8] was submitted to the I.C.C. at its resumed hearings on December 7, 8 and 9, 1949. (R. 220-251; 398-424; 433-496, and Exhibits 32 to 36, incl.)

The I.C.C. made comprehensive findings and rulings upon this evidence (279 I.C.C. at 156-162) and reached the conclusion that the revenue received by the New Haven under its New York intrastate commutation fares as increased under the authority of the State Commission on July 9, 1949, is less than the cost of the service. The I.C.C.'s conclusion upon this question of fact is expressed as follows (p. 162):

> On a whole, giving due consideration to the above-mentioned conservative aspects of respondent's study as well as to protestant's criticisms thereof, we conclude that respond-

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[7] Record references are to the page numbers of the transcript of the hearings before the I.C.C., a certified copy of which was introduced in the District Court as Ex. No. 1.

[8] That report was incorporated by reference into the I.C.C. record by agreement of counsel (R. 208-9).

> ent's estimate of the present cost of this service can in no event be said to be overstated by more than $42,000, and that, even with the increases granted by the New York Commission, the revenue received from this service is less than the cost thereof, leaving nothing for return on the value of the property devoted thereto.

This conclusion is restated as Finding No. 11 (p. 163) reading:

> * * * neither the New York intrastate commutation fares in effect prior to July 9, 1949, nor the so-called interim commutation fares which became effective on that date, produce sufficient revenue to cover the cost of providing the service for such travel, including a reasonable return on the investment properly chargeable to such service.

In this connection, supporting evidence showed that straight time hourly wages paid by the railroad are about 100% higher than they were in 1926; that prices of materials are about 51% higher; that these higher costs have caused serious losses in the conduct of the New Haven's passenger service; and that the relatively smaller increase in intrastate, as opposed to interstate, commutation fares has put a disproportionate burden on interstate travel.

It was in view of these increased expenses and serious deficits that the I.C.C., in April and September, 1947, authorized increases in freight rates, in standard passenger fares, and in commutation fares (see discussion *supra*). On subsequent dates, the Commission authorized further increases in standard passenger fares. In December 1947, in

Increased Coach Fares, New Haven Railroad, 269 I.C.C. 291, the Commission authorized the New Haven to increase its standard coach fares from 2.5 cents to 2.875 cents per mile, and these increased fares became effective December 15, 1947. In July 1948, in *Increased Fares, Eastern Railroads, 1948,* 272 I.C.C. 17, the Commission authorized further increases in the standard passenger fares in coaches and pullmans of eastern carriers, including the New Haven. Generally, these increases resulted in standard fares in coaches and pullmans of 3 cents and 4 cents per mile, respectively. In November, 1949, these figures went to 3.375 and 4.5 cents, respectively. *Increased Fares, Eastern Railroads, 1949,* 276 I.C.C. 473.

Despite these increases the passenger service of the New Haven has continued to be operated at a large deficit. As shown in Appendix II of the present report, these deficits were $4.4 million in 1947, $5.6 million in 1948, and $7.7 million in the first ten months of 1949. The latter were the latest figures available at the time of the hearings in December 1949. During these periods the net railway operating income from freight operations were $9.1 million, $16.4 million, and $14.9 million, respectively. The deficits in passenger operations had to be borne by the freight operations. When these incomes from freight operations are reduced by the passenger deficits, the net railway operating incomes for the freight and passenger operations together become $4.7 million, $10.9 million, and $7.2 million, respectively, resulting in rates of return of 1.21 percent, 2.72 percent, and 1.79 percent, respectively.

The New Haven's outstanding characteristic is the importance of its passenger service operations, of which its commutation service is a substantial part. In 1948, its passenger service accounted for 71.1% of the train miles, 41.1% of the total operating revenues, and 48.2% of the total operating expenses. For the first ten months of 1949, these corresponding figures were 73.5%, 42.3%, and 51.3%, respectively (279 I.C.C. at 155). "As shown by Appendix II," the Commission said, "there has been some improvement since 1947 in the results from respondent's freight operations, but this is not true of the results from its passenger train operations * * *" (p. 155).

In the present report the Commission found (Fng. No. 2) that the increase in operating costs due to increases in wages and the prices of materials and supplies applies to all the services and facilities furnished by respondent for both freight and passenger transportation, interstate and intrastate, including the service and facilities furnished for the transportation of commutation passengers intrastate within the State of New York.

The Commission further found that respondent must look to its passenger service operations for a substantial portion of its gross revenues; that respondent's passenger service operations result in a substantial deficit; that commutation traffic is an important and substantial factor in respondent's passenger operations and gross passenger revenue; and that respondent's New York intrastate commutation traffic is an important and substantial portion of its total commutation traffic (Fngs. 3, 4, 5 and 6).

Increases in the respondent's present New York intrastate commutation fares by percentages equal to the percentage increases in the New Haven's interstate commutation passenger fares will produce additional revenues of $216,000 annually. The Commission found (Fng. 9) that the New York intrastate commutation fares which it prescribed "will be just and reasonable for the future" and "will produce substantial additional revenue."

In sum, we believe that the evidence fully supported the conclusion that discrimination against interstate commerce resulted from the low non-compensatory rates which prevailed in New York. In this connection, the district court stated:

> The plaintiff leans heavily upon the case of *North Carolina* v. *U. S., supra* [325 U. S. 507], as authority for its contentions. The order in that case was statewide in its scope and affected rail carriers who were already operating at an unusual profit. The court held there that a single finding that interstate passengers paid a higher fare than intrastate passengers for the same facilities was inadequate to support an order nullifying state-authorized rates upon a finding of prejudice to interstate passengers. It held that a reliance upon the existence of a disparity between the interstate and intrastate rates, in the absence of a finding that the intrastate rate was less than compensatory, was insufficient to sustain an order nullifying state-authorized rates upon a finding of prejudice to interstate commerce. Here we have findings that the intrastate rate is less than compensatory. We also have findings as to relationship of commutation traffic to the total operation. We have a finding of reasonableness of the interstate rates which implies

> a correct percentage allocation of commutation revenue and expense. We have a finding as to the deficit in operations; all of which would seem to satisfy the deficiency found to exist in the *North Carolina* case. Substantial evidence to support such findings is clearly in the record, and the finding of discrimination as to interstate commerce is legally justified.

A second judicial scrutiny of the record to determine the adequacy of evidence to sustain a rate order made by an administrative agency would be a burdensome exercise of appellate review not called for in the interest of orderly and efficient administration of justice.

Additional Contentions of Appellants

Appellants assert that the intrastate and interstate travel are not fairly comparable, although the service is performed over the same tracks by the same carrier. They rest this contention exclusively on the ground that air-conditioned trains are used for some of the Connecticut-New York runs. It is plain, however, that a finding of substantial similarity does not impart that there is a complete identity of service at all times and in all particulars. Moreover, as already noted, the Commission considered this factor (as well as all other relevant factors) and found that it was, in any event, adequately compensated for in the rates prescribed.

Appellants also argue that the examiner's proposed report failed to make findings upon all of the material issues presented, and was vague and indefinite, in disregard of requirements of the Administrative Procedure Act. Although we believe that even a cursory reading of the examiner's re-

port reveals that appellants' criticism is unwarranted, the issue is not in any event substantial. The Administrative Procedure Act (§ 10(e), 60 Stat. 243, 5 U.S.C. 1009) specifically provides that in judicial review of agency action "due account shall be taken of the rule of prejudicial error." Here appellants obviously were not prejudiced since they had a full hearing before the Commission and the Commission gave painstaking consideration to the entire record and to the contentions advanced by appellants.[9]

Appellants further contend that the Commission's finding that the intrastate rates, compared to the interstate rates, caused undue preference of particular localities is not supported by preliminary findings. Assuming this to be true, the order is nonetheless fully supported by the finding that the lower, non-compensatory intrastate rates caused unjust discrimination against interstate commerce from the revenue standpoint. See *Florida* v. *United States, supra.* This ultimate finding, as shown above, was rested upon detailed and explicit subordinate findings and upon a wealth of supporting evidence.

CONCLUSION

The Commission found that the level of the New Haven's intrastate commutation rates in New York was lower than that prevailing on the New Haven's interstate passenger traffic; that it was similarly lower than the level of rates for intrastate travel prevailing in Connecticut, Massachusetts and

[9] Subsequent to the preparation of the examiner's proposed report, the New York Commission was given full opportunity to file exceptions thereto and to present oral argument before the Commission. Both opportunities were availed of.

Rhode Island, the other states where the New Haven operates; that the New York rates were non-compensatory and, to the extent that they were lower than the interstate rates and the intrastate rates prevailing outside of New York, a burden on interstate commerce; that the interstate rates of the New Haven were just and reasonable and that it was necessary to maintain them if the carrier was to operate efficiently; that New York was not paying its way and that the carrier was in serious need of added revenues to meet increased operating expenses. All of these findings involved determinations of fact of the kind which the Commission is peculiarly qualified to make. The district court, as is evident from its opinion, has carefully reviewed the evidence and has found that it fully supports the Commission's findings. Its decree should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.
J. STANLEY PAYNE,
Assoc. Chief Counsel,
Interstate Commerce Commission.

August 1951.

CERTIFCATE OF SERVICE

I certify that I have served copies of the foregoing motion, by mail, on counsel for all of the parties hereto.

RALPH S. SPRITZER,
Special Assistant to
the Attorney General.

AUGUST 15, 1951.

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Supreme Court of the United States

STATE OF NEW YORK and the PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners-Appellants,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee,

and

INTERSTATE COMMERCE COMMISSION and the NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Intervenor-Defendants-Appellees.

BRIEF FOR APPELLANTS IN REPLY TO MOTION TO AFFIRM.

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Dated, September 17, 1951.

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Intervenor-Defendants-Appellees.

BRIEF FOR APPELLANTS IN REPLY TO MOTION TO AFFIRM.

Statement.

This brief is submitted in opposition to appellee's motion to affirm a decree of the District Court of the Northern District of New York entered June 6, 1951. The decree dismissed the petition of the State of New York and the Public Service Commission to annul an order of the Interstate Commerce Commission, which directed an increase in the intrastate commutation fares of the New York, New Haven and Hartford Railroad over and above that authorized by order of the Public Service Commission.

Copies of the opinion of the District Court, which has not yet been reported, and of its final decree entered on June 6, 1951, are attached to the statement as to jurisdiction, as Appendices A and B.

Jurisdiction.

As a party to a determination of a District Court of three judges, the appellants State of New York and Public Service Commission are entitled to appeal to this Court as a matter of right [28 U. S. C. 1253]. A petition for appeal was filed and allowed on July 30, 1951.

The Questions Presented.

The State of New York claims that its Public Service Commission was improperly divested of jurisdiction over the intrastate rates of the Railroad.

There was no serious contention of undue discrimination as between persons or localities. No evidence was offered to prove it. No finding was made on it other than as part of one blanket finding which in *haec verba* found all of the elements specified by the statute. This brief contains no further discussion of that type of discrimination.

The real issue is whether intrastate commuter fares fixed by New York State unduly discriminated against interstate commerce.

The Interstate Commerce Commission and the District Court have held that unlawful discrimination was shown by:

(1) Lower commutation rates for intrastate than for interstate traffic over the same route;

(2) Failure of intrastate commutation service to pay a return on investment allocated to it;

(3) Common use of inferior facilities of the intrastate commuters by 18.9 per cent of the interstate commuters.

The State of New York contends that although intrastate commutation rates are lower than interstate, this does not constitute unlawful discrimination, because:

(1) As shown by undisputed evidence, intrastate commuting service is substantially inferior to that given interstate commuters;

(2) Discrimination is not proved by the claimed failure of the intrastate commuter rates to provide an adequate return on the investment allocated to that service:

(a) in the absence of proof that they provide a lower return than interstate commuter rates or interstate passenger fares;

(b) When even in the report of the Examiner it is conceded that intrastate commuter service "breaks even" whereas the general passenger service of the company operates at a substantial deficit;

(3) The Commission refused to require proof of a comparison as to cost and profitableness of the intrastate commuting service in question and interstate commuting service and interstate general passenger service.

The State further contends that these jurisdictional defects were concealed by inadequate findings which substantially prejudiced the appellants in securing a review by the Interstate Commerce Commission and the District Court.

The Facts.

On September 5, 1947 the Interstate Commerce Commission approved increases of 25 per cent for unrestricted monthly tickets of interstate commuters and 15 per cent for restricted tickets. The Public Service Commission considered an application for increased rates for intrastate tickets of the same kind and authorized an increase of only 18 per cent for unrestricted and 6 per cent for restricted monthly tickets.

Most of the basic facts asserted by the Interstate Commerce Commission as a basis for its jurisdiction are not disputed by the appellants. Thus, it is conceded that the railroad is operated at a substantial deficit; its passenger service operations, including intrastate commutation traffic, constitute a substantial portion of its gross revenues; operating costs have increased both for intrastate and interstate service. For the purposes of this argument no attack is made upon the interstate fares fixed for the railroad by that Commission.

The following facts are also undisputed. The Public Service Commission believes that they show the substantial dissimilarity between interstate and intrastate commuter service (except as to trains which serve jointly interstate and intrastate commuters).

SEATS	Intrastate:	Triple seats on one side of car; double seats on the other.
	Interstate:	No triple seats.
SEAT WIDTH PER PASSENGER	Intrastate:	19 inches.
	Interstate:	22 inches.
CAR AGE	Intrastate:	27 years.
	Interstate:	11 years.

AIR CONDITIONING	Intrastate:	2.4 per cent of commuters ride air-conditioned trains.
	Interstate:	81.1 per cent of commuters ride in stream-lined air-conditioned trains.
RUSH HOUR CARLOAD	Intrastate:	110-113 per car.
	Interstate:	64 per car.
EXPRESS SERVICE	Intrastate:	Express service only to insignificant extent.
	Interstate:	71 per cent of commuters do not stop in New York State.
CAR WINDOWS	Intrastate:	Single sash, narrow.
	Interstate:	Double sash, wide, giving better insulation and more light.
HEAT	Intrastate:	Manually controlled.
	Interstate:	Thermostatically controlled.

Also uncontroverted is the fact that although the general passenger revenues of the railroad showed consistent and substantial deficits since 1947, the railroad's intrastate commuting service under New York State rates, in the language of the Interstate Commerce Commission Examiner, "breaks even" (Examiner's Rept., Sheet 9, attached to petition as ex. 3).

The only dispute as to underlying facts which will be presented on this appeal is the cost of intrastate commuter service. The State of New York contends that the railroad under State-approved rates earned a return on investment of 15 per cent. The report of the Interstate Commerce Commission Examiner states that this service merely "broke even". The New York Commission asserted that the Railroad over-estimated the cost of this service by $90,000 per month. The Interstate Commerce Commission by crude

compromises apparently concluded that the over-estimate was only $42,000. Except for scattered criticism contained in the report, there was no definitive disposition of the items raised by the Public Service Commission. These items are:

Maintenance of way	$ 1,800	
Maintenance of equipment	1,200	
Traffic	3,871	
Trackage rights	12,227	
Grand Central Terminal:		
Expenses and taxes and rent	4,276	
Credit for ground rentals	24,207	
Related items	3,046	
Sub-total		$50,627
Over-estimate of 40-hour week expense		15,000
Improper use of group, rather than train-by-train method		25,000
Total over-estimate		$90,627

In spite of the perhaps comparable expertness of the New York Commission, the District Court disallowed its assertions on the basis of the substantial evidence rule.

POINT I.

The Interstate Commerce Commission acted without jurisdiction. The rates authorized by the Public Service Commission did not unduly discriminate against interstate commerce. The proof did not contain substantial evidence of such discrimination.

The claim of jurisdiction by the Interstate Commerce Commission is derived from subdivision (4) of Section 13 of the Interstate Commerce Act. The provisions of this statute are as follows:

> "(4) Whenever in any such investigation the commission, after full hearing, finds that any such [State-approved] rate, fare, charge, classification, regulation, or practice causes * * * any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. * * *"

In *North Carolina* v. *United States* (1944), 325 U. S. 507, 510, this Court pointed out to the Interstate Commerce Commission that there were sharp limitations upon its power to determine intrastate rates upon a system-wide basis. The Court said (pp. 510-511):

> "Section 13(4) does not relate to the Commission's power to regulate interstate transportation as such. As to interstate regulation, the Commission is granted the broadest powers to prescribe rates and other transportation details. See *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612. No such breadth of authority is granted to the Commission over purely intrastate rates. Neither §13(4), nor any other Congressional legislation, indicates a purpose to attempt wholly to deprive the states of their primary authority to regulate intrastate rates. Since the enactment of §13(4), as before its enactment, a state's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate."

That case held that lack of uniformity of rates alone did not prove discrimination. Additional tests must be met. The questioned rates must (1) contribute less than their "fair share" of revenue, or be (2) abnormally low, (3) less than reasonably compensatory, or (4) insufficient to cover the full cost of service. [*Ibid.*, pp. 514-515.]

The Interstate Commerce Commission has here acted upon the assumption that these tests are met by a finding that the rates in question did not in themselves produce a reasonable return on the investment properly chargeable to them. It concluded that once this finding is made, it may regulate these rates on a system-wide basis like interstate rates. By unavoidable implication, it held that it makes no difference that the state rates being superseded produce a substantially higher return than comparable interstate rates.

The State of New York submits that such a construction is inconsistent with any concept of discrimination and in conflict with the language of this Court's opinion in the *North Carolina* case.

"Discrimination" suggests a comparison, a distinction, inequality, as between two classes rather than a failure to measure up to some objective standard [Webster's New International Dictionary—2nd Edition].

The Court's opinion emphasized the primary responsibility of the states for intrastate rates. [*North Carolina* v. *United States, supra,* 325 U. S. 507, 511.] This would be a farce if that regulation were to be automatically dominated by a rate of return established by the Interstate Commerce Commission.

The Court in listing factors of discrimination adopts the expression "fair share". This is a comparative concept and can be determined only by comparing rate of

return developed by the rates in question with those of the services allegedly discriminated against. The objective factors listed by the Court (*Ibid.*, pp. 514-515)—"abnormally low", "less than reasonably compensatory" and insufficiency to cover the "full cost of service"—were derived from an older opinion of this Court, *Florida* v. *United States* (1933), 292 U. S. 1, 8-10, which dealt with intrastate freight rates which produced a net operating loss and thus a drain upon the return produced by interstate rates. That these objective factors are dominated by the comparative "fair share" concept is conclusively apparent from the language of the Court, 325 U. S. at page 520. It said:

> "The power of the Commission to require states to raise their intrastate rates depends upon whether intrastate traffic is contributing its *fair share* of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property directed to the transportation service both interstate and intrastate. *United States* v. *Louisiana*, 290 U. S. 70, 75." (Emphasis added.)

The test of the Court is "Do the questioned rates contribute a 'fair share' to the company's over-all rate of return?" not "Do the rates themselves produce a full return on their isolated service?"

New York commuters pay the full cost of service. They are certainly no drain on the passenger revenues of the Company. To determine the "fair share" to be contributed by New York commuters requires a computation of the comparative cost and profitableness of their service against the appropriate branches of interstate service. This is the comparison which the Interstate Commerce Commission refused to make. In the language of the

North Carolina case, "The Commission made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income" (325 U. S. at p. 516).

In one significant aspect this case presents arguments far more compelling than those presented in the *North Carolina* case. Here, the reason for the greater profitableness of the intrastate service is the substantially inferior service given New York commuters. The Railroad gets 1200 of them in a 10-car train as compared with 800 in an interstate train.

Passenger service is more than a matter of route and destination. Regular intrastate commuters who must make long daily trips to New York City during the rush hour travel an average round trip of 34 miles. They spend a sizable fraction of the few hours between work and sleep on these trains. The degree of comfort which they receive is important to them. Any one of the 17,000 intrastate commuters of the New Haven, who is required to make his daily trip wedged into a triple seat congested by overcoats, fur coats, umbrellas and newspapers while being repeatedly passed by comfortable, streamlined air-conditioned trains from a neighboring community, will attest the superficiality of the attempt by the Interstate Commerce Commission and the District Court to dismiss the differences between intrastate and interstate commuting service as a mere question of air conditioning and aesthetics.

Certainly once the disparity in interstate and intrastate service is considered, the Interstate Commerce Commission could not properly find that the Public Service Commission rates were unduly discriminatory, without some comparison of the cost and profitableness of the intrastate commutation service with that of interstate service [*North Carolina* v. *United States, supra,* 325 U. S. 507; *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, 483-4].

POINT II.

The findings of fact upon which the Interstate Commerce Commission professes to act are inadequate and do not sustain its ultimate conclusion that it had jurisdiction.*

This Court has apparently held that in Section 13 proceedings such as this the Interstate Commerce Commission's findings even as to its own jurisdiction to supersede a state regulatory body, are entitled to the benefit of the substantial evidence rule. [*Florida* v. *United States* (1934), 292 U. S. 1, 12.] The State commissions have thus been deprived of the more complete protection to be had by the Court's independent determination of the jurisdictional facts as in railroad abandonment cases. [*United States* v. *Idaho* (1935), 298 U. S. 105, 109.] The District Court in the present case leaned heavily on this rule. [Opinion, page 5, pars. 2 and 4.]

In the absence of this protection of complete court review, it has been held that the jurisdiction of the Interstate Commerce Commission must clearly appear. [*Florida* v. *United States,* 282 U. S. 194, 211-212] and it has been further held that the Commission must be so circumspect in extending its claim of jurisdiction that even "the intention to interfere with the states' rate-making function is not to be presumed * * * nor must its intention in this respect be left in serious doubt." [*North Carolina* v. *United States* (1944), 325 U. S. 507, 511.] Under the circumstances the only protection which a state commission has lies in the requirement for precise findings of fact which make more difficult the overlooking of error under the substantial evi-

* The full findings of the Commission are set forth as Appendix 1.

dence rule. [See *Florida* v. *United States* (1930), 282 U. S. 194, 215.]

There were two principal issues of fact in the proceeding before the Commission:

(1) The inferiority of the service given intrastate passengers, and

(2) Whether that service was less favorable to the railroad from a cost and profit standpoint than interstate service.

As to the first issue, the Commission's finding is vague to the point of evasiveness. It does not find that intrastate and interstate passengers did receive similar service or that they did not receive similar service. It finds that the service was similar "except with respect to the average haul and relative service adverted to above."

The language of the full finding is as follows:

> "That the circumstances and conditions surrounding the transportation of commutation passengers in intrastate commerce between stations on respondent's line within the State of New York are substantially similar to those surrounding the transportation of commutation passengers in interstate commerce between stations on respondent's lines in the State of New York and Connecticut, except with respect to the average haul and relative service adverted to above, and that these differences in transportation conditions do not justify more favorable treatment with respect to fare increases of the New York intrastate commuters than of interstate commuters and intrastate commuters in the other three States traversed by respondent."

The "except" clause above quoted is nothing but meaningless, pseudo-technical jargon. It is impossible for any

court to understand from it what actual differences in service exist between interstate and intrastate passengers. Although the clause refers to the Commission's memorandum which preceded it, a careful search of that memorandum and the memorandum of the Hearing Examiner gives no unequivocal clue as to its meaning. The most that can be gathered is that railroad rates per mile cease to decrease after the 40th mile and therefore, somehow, persons traveling longer distances compensate for the superior equipment which they enjoy. That this is the meaning is not at all clear but if it is, it discloses a gross fallacy, because the average interstate passenger does not travel more than 40 miles. The observation, of dubious validity at best, was therefore basically irrelevant to the issue before the Commission.

Inasmuch as the finding successfully masks the differences between interstate and intrastate service, it is impossible for a court to evaluate with fairness the conclusion in the second half thereof, that the differences in service did not justify a difference in rates.

This finding is of a class heretofore condemned by this Court. Its vague incorporation by reference of the entire preceding memorandum falls within the comment of Mr. Justice Cardozo in the case of *U. S.* v. *Chicago, Mo., St. P. & P. R. R. Co.*, (1934), 294 U. S. 499, 510:

> "• • • The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86; *Florida* v. *United States*, 282 U. S. 194, 215. We must know

> what a decision means before the duty becomes ours to say whether it is right or wrong."

It disregarded the warning given in *Atchison Railway* v. *United States* (1935), 295 U. S. 193, 201-2:

> "This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained."

Finally, it does not comply with the Administrative Practice Act which provides [5 U. S. C. 1007, sub. (b)]:

> "• • • All decisions • • • shall • • • include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record; • • •"

On the second controverted issue of the proceeding—whether intrastate commutation service was less favorable to the railroad than its comparable types of interstate passenger service—the Interstate Commerce Commission refused to make any finding whatever. From the facts recited in the memorandum and in other findings, it is possible to discover that intrastate commuting service is *more* favorable to the railroad than its general, over-all passenger service, but the State of New York was entitled to a precise finding to this effect, to assist it in securing a comprehending review by the Commission and the Courts.

In *Yonkers* v. *United States* (1944), 320 U. S. 685, this Court set aside a determination of the Interstate Commerce

Commission because it did not contain a precise finding as to a jurisdictional fact. The case now presented to this Court contains far more persuasive reasons for reversal. Whereas in the *Yonkers* case the failure of the Interstate Commerce Commission may have been due to oversight or the uncontested nature of the fact in question, in the case at bar the issue on which the Commission refused to find is one of the crucial issues of the case and it had been hotly contested from the outset. Further, if the Commission had made the only possible finding which the evidence before it permitted, that finding might have changed the outcome of this entire litigation.

These objections to the findings of the Commission are not taken for any technical or formalistic reason. The Public Service Commission certainly has no desire to see regulatory agencies hampered by useless formalisms. The objection as to which relief by this Court is sought is that the defective findings in this proceeding concealed a fatal weakness in the Interstate Commerce Commission's claim of jurisdiction. The protection sought is that which the Court extended in *United States* v. *Carolina Carriers Corp.* (1941), 315 U. S. 475, 489, where it said:

> "• • • If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away."

Conclusion.

Under the facts and circumstances of this case, the action of the Interstate Commerce Commission constituted a direct regulation of New York intrastate commutation fares to make them uniform with the interstate fares for the same distances. Congress has conferred no such power

upon the Commission and the District Court erred in failing to so hold (*North Carolina* v. *United States*, 325 U. S. 507, 510, 511).

Substantial questions are presented for review by this court and the motion to affirm should not be granted.

Dated, September 17, 1951.

Respectfully submitted,

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Appendix 1.

Findings of the Interstate Commerce Commission.

Upon this record, we find:

1. That the circumstances and conditions surrounding the transportation of commutation passengers in intrastate commerce between stations on respondent's line within the State of New York are substantially similar to those surrounding the transportation of commutation passengers in interstate commerce between stations on respondent's lines in the States of New York and Connecticut, except with respect to the average haul and relative service adverted to above, and that these differences in transportation conditions do not justify more favorable treatment with respect to fare increases of the New York intrastate commuters than of interstate commuters and intrastate commuters in the other three States traversed by respondent.

2. That the increase in operating costs due to increases in wages and the prices of materials and supplies applies to all the services and facilities furnished by respondent for both freight and passenger transportation, interstate and intrastate, including the service and facilities furnished for the transportation of commutation passengers intrastate within the State of New York.

3. That respondent must look to its passenger service operations for a substantial portion of its gross revenues.

4. That respondent's passenger service operations result in a substantial deficit.

5. That commutation traffic is an important and substantial factor in respondent's passenger operations and gross passenger revenue.

6. That respondent's New York intrastate commutation traffic is an important and substantial portion of its total commutation traffic.

7. That the monthly commutation fares for intrastate travel between stations on respondent's line within the State of New York, made or imposed by authority of that State, cause, and unless increased to the extent herein set forth, will continue to cause—

(a) undue and unreasonable advantage to and preference of persons and localities in intrastate commerce in the State of New York and undue and unreasonable disadvantage and prejudice to persons and localities in interstate commerce between stations in the State of Connecticut and New York, and

(b) undue, unreasonable and unjust discrimination against interstate commerce,

in violation of the provisions of paragraph (4) of section 13 of the Interstate Commerce Act.

8. That such advantage, preference, disadvantage, prejudice and discrimination can and should be removed by establishing for intrastate travel within the State of New York fares arrived at by adding to the fares in effect on July 8, 1949, 25 percent in connection with the unrestricted tickets and 15 percent in connection with the restricted tickets, the resulting fares to and from New York City being set forth under the heading Proposed in Appendix I hereto.

9. That such increased fares will be just and reasonable for the future and will produce substantial additional revenue.

10. That the present interstate commutation fares for travel between points on respondent's lines in Connecticut and New York were found reasonable for the future in *Increased Passenger Fares, Eastern Railroads*, 269 I. C. C. 87, that there have been no subsequent changes in conditions which would warrant a reduction in such fares, and that such fares will continue to be just and reasonable for the future.

11. That neither the New York intrastate commutation fares in effect prior to July 9, 1949, nor the so-called interim commutation fares which became effective on that date, produce sufficient revenue to cover the cost of providing the service for such travel, including a reasonable return on the investment properly chargeable to such service.

12. That the increased intrastate commutation fares herein found reasonable are necessary for the future in order that the travel thereunder may make a fair contribution to the revenues needed by respondent to meet its increased operating expenses due to increases in wages and in prices of materials and supplies, and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service.

Office-Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER 1951 TERM.

No. 346.

STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee,

and

INTERSTATE COMMERCE COMMISSION AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Intervenor-Defendants-Appellees.

PETITION FOR REHEARING OF ORDER GRANTING MOTION TO AFFIRM AND FOR HEARING ON THE MERITS IN REGULAR COURSE.

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Intervenor-Defendants-Appellees.

PETITION FOR REHEARING OF ORDER GRANTING MOTION TO AFFIRM AND FOR HEARING ON THE MERITS IN REGULAR COURSE.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners-Appellants, the State of New York and the Public Service Commission of the State of New York, pray that this Court grant rehearing and reconsideration of its order of November 26, 1951, granting the motion of

the appellees United States of America and Interstate Commerce Commission to affirm, and affirming the judgment herein, and that the Court retain the case for hearing on the merits in due course.

Reasons for Granting Rehearing and for Argument on the Merits.

1. In this case the State of New York was divested of jurisdiction in the fixing of intrastate railroad rates without ever being given a clear reason why. This was done without proof that the rates fixed by the State agency discriminated against interstate commerce, against any person or against any locality. This was done without a finding of any specification of discrimination other than a blanket finding in the terms of the statute. In spite of the lack of proper findings with respect to the facts on which its jurisdiction was based, and in spite of the dissent of one of the Commissioners who heard the case, the District Court affirmed the action of the Interstate Commerce Commission, purportedly relying on the substantial evidence rule. Upon the State's appeal to this Court as a matter of right, the appeal was disposed of without full argument and without examination of the record on a motion to affirm, which, according to the rules of this Court, is granted where "it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the case depends are so unsubstantial as not to need further argument." even on the fragmentary presentation permitted in opposition to the motion to affirm, one of the members of this Court dissented on the merits from the affirmance of the court below. A second member of this Court voted to deny the motion to affirm and to permit a full argument of the merits of the case.

2. The need for a determination of the proportionate amount of the railroad's revenue to be borne by intrastate traffic before it is possible to conclude that intrastate rates discriminate against interstate commerce, as stated in Mr. Justice Douglas' dissent, is amply sustained by decisions of this Court and prior to this proceeding was recognized consistently by the Interstate Commerce Commission itself. If all factors relating to both types of transportation are equal, probably rates should be equal, but if there are substantial differences between intrastate and interstate service and the cost of those services, it is not enough that the Interstate Commerce Commission found that the rates for intrastate service, as fixed by the State Commission, were less than the rates for interstate service.

The elementary principle that rates and fares for transportation service performed under the same circumstances and conditions should be identical was recognized by the courts long before Section 13 was enacted. For example, the Supreme Court in the *Shreveport* case upheld an order of the Interstate Commerce Commission removing an unjust discrimination created by lower intrastate rates for transportation rendered "under substantially similar conditions of traffic" (234 U. S. 342, 354).

Consequently, since the enactment of Section 13, the issue of whether interstate and intrastate transportation is performed under substantially similar circumstances and conditions has necessarily been presented and determined in all proceedings before the Interstate Commerce Commission arising under that section. It was in accordance with this principle that the New Haven alleged in paragraph VI of its petition that "the circumstances and conditions of the transportation of New York intrastate and Connecticut-New York interstate commutation passengers

are substantially similar." (Exhibit 1 attached to the petition in the District Court.)

The basis of the New Haven's petition was that the Interstate Commerce Commission had authorized an increase in its interstate commutation fares and that, since the circumstances and conditions surrounding the two classes of commuter service were allegedly substantially similar, the lower New York fares caused the two types of discrimination prohibited by Section 13. Accordingly, New Haven asked for a Section 13 order increasing the New York fares to make them uniform with the interstate fares for the same distances.

The Interstate Commerce Commission has in all Section 13 cases made a finding concerning the transportation conditions surrounding interstate and intrastate traffic as a basis for the issuance of Section 13 orders. A few of these cases are listed below.*

In most Section 13 cases the Interstate Commerce Commission has been able to find upon substantial evidence that the circumstances and conditions surrounding interstate and intrastate traffic were substantially similar. In at least two cases, however, the evidence showed that the conditions were not similar and the proof was such that the Interstate Com-

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* *Increases in Alabama Freight Rates and Charges*, 274 I. C. C. 439, 464;
Texas Intrastate Rates, 273 I. C. C. 749, 770;
Increases in Tennessee Freight Rates and Charges, 272 I. C. C. 625, 646;
Mississippi Intrastate Express Rates and Charges, 273 I. C. C. 777, 797;
Increases in Arizona Freight Rates and Charges, 270 I. C. C. 105, 124;
Coal to Beloit, Wisconsin, and Northern Illinois, 263 I. C. C. 179, 213;
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Rhode Island Commutation Fares, 253 I. C. C. 383, 389;
Intrastate Rates within Illinois, 102 I. C. C. 479, 487.

merce Commission was able to find that the circumstances and conditions surrounding intrastate traffic were *less favorable* to the carrier than those surrounding interstate traffic.

For example, in the Florida Log case, *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, 189 (292 U. S. 1), the Commission stated: "We find that the circumstances and conditions surrounding the transportation of these logs intrastate in Florida are not on the whole as favorable [to the carrier] as the circumstances and conditions surrounding the interstate movement * * * over the defendant's line." In support of that conclusion the Commission found (186 I. C. C. at p. 187) that: "The record shows * * * the much lower earnings on its Florida log traffic than on its interstate log traffic * * * These facts and the cost evidence clearly warrant the conclusion that the traffic moving under the Cummer scale [the intrastate rates] does not pay its 'fair proportionate share' of operation and maintenance alone."

Substantially the same finding was made in *Increases in Tennessee Freight Rates and Charges*, 272 I. C. C. 625, 646.

In this case the uncontroverted evidence shows the contrary. Here, the circumstances and conditions surrounding New York commutation traffic are *more favorable to the New Haven since the interstate commuters are provided with superior and more costly service.*

The Interstate Commerce Commission, in briefs submitted to this Court in Section 13 cases, has time and again referred to the importance and significance of the finding that the circumstances and conditions surrounding interstate and intrastate transportation are substantially similar. Thus, in its brief filed in this Court in *North Carolina* v. *United States*, 325 U. S. 507, the Commission stated (pp. 24-27):

> "The evidence * * * was ample to support the Commission's finding of similarity of interstate and intrastate transportation conditions. * * * Decisions of this Court * * * make it clear that intrastate traffic is not contributing its fair share * * * where the intrastate rates are lower * * * [and] where the transportation conditions affecting the interstate and intrastate traffic are substantially similar."

In its petition for rehearing, filed with this Court in the same case, the Interstate Commerce Commission stated at page 23:

> "When a disparity between interstate and intrastate rates is the subject of investigation, the first question is whether the interstate rate is reasonable and the next is whether the *transportation conditions* warrant an intrastate rate lower than the reasonable interstate rate * * * In many, perhaps most, of such cases, the Commission has prescribed an intrastate rate equal *mile for mile* to the interstate rate, to the end that both interstate and intrastate traffic will pay equal rates for equal service."

Similar statements were made by the Commission on page 27 of its brief filed in this Court in *Illinois Commerce Comm. et al.* v. *United States,* 292 U. S. 474. In that case this Court emphasized the importance of such a finding by holding that the operating results of each class of traffic need not be shown when it is found that the transportation conditions surrounding the two classes of traffic are substantially similar.

In an attempt to support this important allegation of its Section 13 petition, the New Haven relied entirely on the testimony of its witness Harold Q. Quinlan (125).* His

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* Numbers in parentheses refer to pages of the minutes before the Interstate Commerce Commission which are a part of Exhibit 1 in the District Court.

testimony on this question was limited to a statement that many of the interstate trains make stops in New York State and that "New York intrastate commutation passengers travel on these interstate trains, ride in the same cars, and often occupy the same seat with interstate commutation passengers" and that both classes "travel over the same line of railroad between Port Chester and New York City and use the same terminal facilities in the latter city" (125). This is all the proof which the New Haven presented on this important issue.

Obviously, this is a mere conclusion unsupported by facts. It has no probative value and cannot support a finding of similarity of transportation conditions. Furthermore, it might be inferred from the statement of the witness that substantial numbers of both groups of commuters travel together. The record shows the contrary.

The evidence shows that an overwhelming majority of interstate commuters ride on modern, streamlined or deluxe trains, whereas the majority of New York commuters ride on old-style trains of the multiple unit type. Over 81% of the interstate commuters ride on air-conditioned, deluxe or streamlined trains, whereas only 2.4% of New York commuters ride on such trains. On the other hand, 91.2% of the New York commuters ride in multiple unit trains, none of which is air-conditioned and none of which carries streamlined or deluxe coaches. Approximately 71% of the interstate commuters travel in deluxe or streamlined trains, which make no New York stops, and during the rush hours when 90% of all commuters travel, only one inbound and two outbound deluxe or streamlined trains make any stops in New York State. Two of those trains make only two New York stops, and the third makes only one stop in New York State (252-314; Exhibit 37).

The only group of trains in which the two classes of commuters travel together in substantial numbers is the multiple unit trains originating or terminating at Stamford, Connecticut. But this group of trains is overwhelmingly patronized by New York commuters and the number of interstate commuters is relatively insignificant. In the five-day test period there were only about 5,600 interstate commuters in this group of trains as compared with 71,000 New York commuters, a ratio of more than 12 to 1. The 5,600 interstate commuters traveling in these trains constituted only 6.8% of the total interstate commuters traveling in and out of Grand Central Terminal in that week (Exhibit 37).

We do not assert that under no circumstances can the Interstate Commerce Commission ever validly find unjust discrimination against interstate commerce where the transportation conditions are not similar. In *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, 187 (292 U. S. 1), and *Increases in Tennessee Freight Rates and Charges*, 272 I. C. C. 625, 646, *supra*, the transportation conditions were not similar. But, the differences in transportation conditions were such that those surrounding the *intrastate traffic were less favorable* to the carriers in respect to cost of service and other factors bearing upon that issue. Accordingly, in those cases the Interstate Commerce Commission was in a position to go a step further and found that the conditions surrounding intrastate traffic were *less favorable* to the carriers as a basis for finding unjust discrimination against interstate commerce caused by the lower intrastate freight rates.

Thus, in *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, the Interstate Commerce Commission stated:

> "In determining the Cummer scale [Florida intrastate rates] results in unjust discrimination against interstate commerce the fundamental question * * * is whether the traffic moving on that scale pays 'a fair proportionate share' of the cost of maintaining defendant, or whether it causes an undue revenue burden upon the interstate traffic of defendant. The record shows the low earnings of defendant; the low earnings on its log traffic as compared with its earnings on other low-grade commodities; *the much lower earnings on its Florida log traffic than on its interstate log traffic;* and the much lower level of the Cummer scale than of other scales applicable to interstate and intrastate throughout the South. These facts and the cost evidence clearly warrant the conclusion that the traffic moving under the Cummer scale does not pay its 'fair proportionate share' of operation and maintenance alone. * * * We find that the circumstances and conditions surrounding the transportation of these logs intrastate in Florida are not on the whole as favorable as the circumstances and conditions surrounding the interstate movement of logs over defendant's lines." (186 I. C. C. at pp. 187, 189; italics supplied.)

In this case the transportation conditions are not similar, but, unlike the two cases just cited, the transportation conditions surrounding New York commuter traffic are *more* favorable to the New Haven since the interstate commuters are provided with superior *and more costly* service.

If, as the Interstate Commerce Commission held in *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, *supra*, the fundamental test, in determining whether intrastate rates cause unjust discrimination against interstate

commerce in violation of Section 13, is whether the intrastate traffic is paying its *"fair proportionate share"* or whether it causes an *undue* revenue burden upon the *interstate traffic* of a carrier, *how is that test to be made* in a case such as this where the conditions surrounding New York traffic are more favorable to the carrier?

The fairness of the proportionate share of the contribution of the New York commuter fares cannot, in this case, be tested by the interstate fares, since that test can be used only when the transportation conditions are substantially similar, or when the differences are such that they are *less favorable* to the carrier in respect to the intrastate traffic.

The impossibility upon this record of testing the fairness of the proportionate share which the New York commutation traffic should contribute may be easily illustrated.

First, let us assume for the sake of argument that the analysis of the operating results of New York commuter traffic as shown by the Interstate Commerce Commission in its memorandum brief in the District Court (p. 31) is correct, and that the service under the interim fares was producing a monthly profit of $186. The Interstate Commerce Commission has directed an increase in the New York fares amounting to $216,000 on an annual basis, or about $18,000 per month. In other words, the Interstate Commerce Commission has held, upon its own analysis, that a monthly profit of $18,186 from New York commutation traffic would be a "fair proportionate share" for such traffic to contribute to New Haven's revenues.

But, the crucial question in this case is, by *what test* or means and upon what evidence could the Interstate Commerce Commission determine that unless the New York fares are increased to produce that additional revenue they

will cause unjust discrimination against interstate commerce?

Clearly, the test could not be merely a fair return upon the New York service under the interim fares, since that would amount to direct regulation of intrastate rates, a power which Congress has not conferred upon the Interstate Commerce Commission.

True, the inadequacy of return might well be an element or factor for consideration in making the test. For example, let us assume that the $18,186 monthly profit determined by the Interstate Commerce Commission to represent the "fair contribution" of the New York commutation traffic would produce a return of only 2% upon the property used in the service and that the interstate commuter traffic was earning a profit which produced a return of 6%. Under those facts, the element of the lower return on the New York traffic could be considered with the other evidence, including the differences in transportation conditions and fares in making the required test to determine the "fair proportionate share" to be contributed by the intrastate traffic.

But, let us assume that the superior and more costly interstate commutation service is producing a monthly loss of $18,186*, whereas the lower fares charged for the New York service are producing a monthly profit of $186. Under such circumstances, it would be patently absurd to even suggest that the New York fares charged for service performed under substantially different and more favorable conditions to New Haven than the interstate service caused any discrimination against interstate commerce.

Conceivably, a fair test of the "fair proportionate share" could be made. But, a more searching and thorough

* The record shows that the interstate traffic is more costly but does not show whether it produces a profit or loss (314).

inquiry would be necessary. The present record does not furnish an adequate basis to make such required inquiry.

The decision of the Court in *Illinois Commerce Comm.* v. *United States*, 292 U. S. 474, 483-4, clearly demonstrates the distinction between Section 13 cases in which it appears that the transportation conditions are similar and those in which the transportation conditions are not substantially similar. There the Court upheld a finding of unjust discrimination against interstate commerce and stated:

> "Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues."

Since a more searching inquiry would be necessary to enable the Interstate Commerce Commission to reach a determination as to whether any unjust discrimination was caused by the New York fares, the New Haven had the burden of presenting the necessary proof. In its absence, the finding of the Interstate Commerce Commission of unjust discrimination against interstate commerce is not supported by substantial evidence.

The deficiency in the proof of the New Haven cannot be excused or ignored by claiming that it would have been difficult or impracticable for the New Haven to present such proof. Other railroads have presented such proof (*cf. Jersey Central Commutation Fares*, 277 I. C. C. 693; *New Jersey-New York Commutation Fares*, I & S Docket 5585, decided March 6, 1950; *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157).

3. The decision of the District Court, as affirmed by this Court, by eliminating the need for proof and findings as to discrimination, in substance makes State-fixed railroad rates reviewable by the Interstate Commerce Commission *on the basis of reasonableness* rather than the single basis provided by Congress, that of discrimination.

4. If, without having the record before it, the Court accepted the view of the facts in this case advanced by the Interstate Commerce Commission and the District Court, the errors in this view should have been more fully presented to this Court than they were in the brief submitted in opposition to the motion to affirm.

The factual issue in dispute is whether the intrastate commuter service for which the State Commission fixed rates merely "broke even", as contended by the Federal Commission, or whether it earned a 15% return, as contended by the State Commission. This controversy is in turn principally dependent upon three items in the cost study which the Company submitted to the Federal Commission. These three items are: (1) the allowance of credit for ground rentals in computing Grand Central Terminal expense; (2) the amount allowed for tolls paid by the New Haven for use of New York Central tracks; and (3) the erroneous use of the group method of ascertaining costs instead of a train-by-train method. Largely because of difference of opinion as to these three items, the railroad claimed that it lost $37,000 a month on the intrastate commuter traffic, the State Commission claimed it made a profit of $48,000 a month; and the Federal Commission's Examiner found that the service "broke even". The State Commission's contentions in greater detail with respect to each of these three items are as follows:

Grand Central Terminal Expense.

In its cost study the New Haven charged to New York commutation service $50,456 as expense for one month for its joint use of Grand Central Terminal, owned by the New York Central. It was the contention of the New York Commission that this item of expense was overstated by $24,207.

The Grand Central Terminal railroad yard is underground on a double deck steel structure, leaving the land at street level and the space above, except the area covered by the station building itself, available for non-railroad use. The Grand Central Terminal covers an area from 59th Street to 42nd Street, extending from the east side of Madison Avenue to the west side of Lexington Avenue.

In the space above the railroad lands in this area, numerous structures have been built, supported by column footings placed on the railroad land. The owners of these buildings pay to the New York Central or its wholly owned subsidiary holding title to the lands substantial sums as ground rents for the space so occupied. These ground rents are distinct from building rents received from the use of the non-railroad structures in which the railroads have made investments. The ground rents are amounts received for the use of the space above the lands used as a railroad yard (321-4).

The New Haven uses Grand Central Terminal jointly with the New York Central under a contract with the latter company, the owner of the Terminal (Exhibit 33, which is a part of Exhibit 3 before the District Court). Under this agreement, the ground rent revenues received by the New York Central for the use of the space above the railroad lands are expressly recognized as credits which actually reduce the net cost for joint terminal use billed by the New York Central to the New Haven.

Accordingly, when the New York Central bills the New Haven for its share of the joint use, the bills specify the amount of Grand Central Terminal rental, taxes and other expenses, and against such expenses are credited (1) Terminal concession revenues*, and (2) ground rent revenues. Under the agreement the difference or net expense is specified on the bills to the New Haven, and that is the amount paid by it for its proportionate use of Grand Central Terminal (327).

The New Haven does not receive any actual revenue in the form of ground rents. Its sole benefit from them is its right under the contract to have them credited against gross expenses of the Terminal in the computation of the net amount payable for its proportionate use. The right of New Haven to have these revenues so credited exists only so long as it continues to use the Terminal for railroad purposes.

In its cost study the New Haven charged to New York intrastate commutation service for Grand Central Terminal expense $24,207 more per month than it actually paid for use of the Terminal by eliminating and disregarding these ground rent credits. It based such elimination upon the claim that they are derived from non-railroad usage of the space above the railroad lands and that they are accounted for on its books as non-operating revenue, with the acquiescence of the Interstate Commerce Commission.

It was and is our position that a charge to one railroad for joint use of the railroad facilities of another should be based upon a reasonable sharing of actual cost and fixed charges, and the Grand Central Terminal contract between the New York Central and the New Haven provides for

* The New Haven did not eliminate these non-railroad concession revenues as credits against the cost of commutation service.

such an arrangement, since it provides a reasonable sharing of the actual net expense of the Terminal (326-333).

It has never been our position, as implied in the report of the Interstate Commerce Commission, that these ground rent credits should be recognized simply because the contract so provides. Our position is that these ground rent credits should be recognized because they represent the proper use of railroad property to reduce transportation cost.

An important item in the cost of rendering passenger service into and out of a large city is a passenger station or terminal in such city. This is particularly true in New York City where terminal cost may be kept within reason only by maximum economy in the use of space and by the most careful efforts to obtain incidental revenues which will reduce transportation costs.

It is apparent that such consideration must have been in the minds of the designers of the Terminal, since the railroad yard facilities were placed at great expense below street level. A double deck steel structure and the enormous expense of such construction, including electrification, which made the underground terminal possible, found its economic justification in the fact that the ground areas at street level and in the space above were left free for profitable use by the erection of commercial structures.

Furthermore, it is our position that such a plan for a terminal in New York City was the obligation of railroad management in the interest of economic transportation, and therefore the true net cost applicable to transportation must recognize the credits available by renting the space above ground to reduce the gross burden of transportation costs.

The New Haven itself recognized this obligation to reduce cost, and in an early commutation fare case conceded that these ground rent revenues would reduce Terminal

expense. (See record on appeal, *People ex rel N. Y., N. H. & H. R. Co.* v. *P. S. C.*, 215 N. Y. 689.) In that case the then president of the New Haven testified:

> "The ground rent of all the terminal service, that is of the service that can be used over where our tracks are, will be credited to the expense of the terminal, and as that increases or that develops it will go toward the terminal expense, and the greater that is the less the terminal expense. As that increases, of course, we will share in the benefits of that increase with the New York Central. It will be all in the bill" (Record on Appeal, fols. 1922-3).

The New Haven argued in its brief that:

> "*All rentals in the terminal go to reduce terminal expenses.*"
>
> * * * * * *
>
> "Complainants' own proof is that the Terminal is credited with all rentals upon the land" (fols. 1921, 1923, 2046), (pp. 1-2).

The fundamental basis for our position in respect to ground rent credits is that New York commutation service should reflect the true net expense of the Terminal, and we contend that the terminal contract between the New York Central and the New Haven is wholly consistent with that principle because it recognizes ground rent revenues as credits reducing the net annual cost of the Terminal.

By every test of reasonableness and as a matter of sound principle, these ground rent revenues should be considered as proper credits to railroad operating costs, enabling passengers to be carried at lower cost than if no such offsets were available to modify the tremendous cost of a mid-town underground railroad terminal.

This contract meets the test of reasonableness (326-333) and is in harmony with the principle recognized by this Court in *Tank Car Corporation* v. *Terminal Co.*, 308 U. S. 422, 428.

Furthermore, the accounting practice followed by the New Haven in respect to these ground rent revenue credits has no bearing on the question of how the credits should be treated in any proceeding involving rates. The complete irrelevance of this accounting practice in a rate proceeding is demonstrated by the decision of this Court in *Norfolk and Western Ry. Co.* v. *U. S.*, 287 U. S. 134, 141-142.

Harlem Toll Expense.

In Exhibit 35 received in the Interstate Commerce Commission proceeding, the New Haven claimed $40,765 a month as an item of expense to New York commutation service for Harlem tolls. It was and is the position of the New York Commission that this item of expense was overstated by approximately $12,000.

The New Haven's right-of-way and track coming into New York City from the east terminate about 12 miles from Grand Central Terminal. From that point its trains operate over the tracks of the New York and Harlem Railroad to Grand Central Terminal. That operation is covered by a perpetual trackage right granted in 1848 by the New York and Harlem Railroad to New Haven.

This trackage agreement (Exhibit 33, a part of Exhibit 3 before the District Court) fixed the compensation rate to be paid at that time and provided for future arbitrations in case of disagreement. The contract left the two parties or their chosen arbitrators free to agree on any amount, or form, or basis of compensation.

There were two arbitrations under the agreement, the last one being in 1861, which provided for payment by the New Haven of specified amounts for each passenger carried in trains of the New Haven over the New York and Harlem tracks into Grand Central Terminal, such amounts to be adjusted in accordance with subsequent changes in New Haven's fares between New York and New Haven (336-9).

The amounts paid per passenger by the New Haven for the use of the Harlem tracks are arbitrary amounts having no relation to actual costs and expenses of the Harlem tracks; thus, it differs fundamentally from the arrangement for the joint use of Grand Central Terminal.

Amounts so arbitrarily fixed and determined should be disregarded in any proceeding involving rates and only the reasonable cost of rendering the service, including a reasonable return on net investment should be allowed (*Tank Car Corporation* v. *Terminal Co.*, *supra*, 308 U. S. 422, 428).

In accordance with that principle, the staff of the New York Commission (307; 336; 339) determined the actual investment on the New York and Harlem tracks and the actual expenses and taxes involved in maintaining the same, including a reasonable return on investment, and made an apportionment of such cost to the New Haven's New York intrastate commutation service. On that basis a reasonable cost per month for trackage service was determined to be $28,538, as compared to $40,765 charged by the New Haven for Harlem tolls to New York commutation service in its cost study.

The New Haven did not controvert this amount of $28,538 for what it purported to represent but rested its claim for Harlem trackage expense solely upon the tolls paid pursuant to the contract.

Group Method against Train-by-Train Method.

In its cost study the New Haven followed what it styled a "group method" of ascertaining the cost of New York commutation service, that is, it selected for cost study purposes as a group all trains making any stops in New York State. This method assigns the same cost per passenger mile to all passengers on all study trains. This method was challenged since it ignored the difference between the heavy traffic density on trains occupied preponderantly by New York commuters on the one hand and the relatively light density on other trains used largely by non-commuters and interstate commuters, on the other. This difference is of particular significance because of the heavy density of New York commuters in the rush hour trains operating in and out of New York City, when 90% of all commuters travel.

It was and is our position that a train-by-train method of determining the cost of New York intrastate commuter service is a proper and correct method, since it necessarily recognizes the varying density of traffic on individual trains.

Accordingly, the staff of the New York Commission, using the basic cost study data submitted by the New Haven, reassembled such data on a train-by-train basis, and the result was to reduce the cost of New York commuter service by $24,253 per month (354-356).

The group method followed by the New Haven apportions train costs between New York intrastate commuters on the one hand and all other passengers on the other hand, by first taking the total cost of those trains as a group and then apportioning such cost to New York intrastate commuters on a passenger mile basis. That method assumes a uniform average cost per passenger mile for all classes of passengers and is obviously erroneous, since it does not take into account the fact that the cost per pas-

senger mile of a train which is heavily loaded is less than the cost per passenger mile of a lightly loaded train. That error is avoided by the train-by-train method used by the staff of the New York Commission.

The New Haven recognized, in an earlier commutation fare proceeding before the New York Commission, this serious error in the group method and the reasonableness of the train-by-train method (Exhibit 40, a part of Exhibit 3 in the District Court).

These three items were of great importance since they totaled approximately $61,000 per month. If the New Haven's cost study is corrected for these three errors its alleged loss of $37,000 per month on New York commutation service becomes a profit, and the New Haven is making a reasonable return on New York service even if all other cost items were decided against our contentions.

It is our position that no conclusion could properly be reached by the Interstate Commerce Commission as to whether the New York service was being operated at a profit or a loss, unless these three issues were decided. Furthermore, no finding could be made as to whether the New York fares caused unjust discrimination against interstate commerce unless and until a determination was made as to whether the New York service was being operated at a profit or loss.

It is to be emphasized that the issues in respect to each of these three items did not involve any mathematical or accounting controversy. There were no factual issues respecting these three important items in the cost study concerning which the conclusion of the administrative body must be accepted. On the other hand, the issues involved only principles of regulatory law.

The first two of the major disputed items, the Grand Central Terminal expense and the Harlem tolls, did not involve any issue of fact. There was no factual dispute over the mathematics and accounting for either of these items. The dispute was limited to the legal rule to be applied to the undisputed facts. Taking the Grand Central Terminal expense item as an illustration, the controversy was limited to the question of whether ground rent credits should be eliminated or included in determining the New Haven's share of terminal expense, a portion of which was chargeable to the cost of its New York commutation service. The amount of the credits appears in the New Haven's records and was not the subject of any mathematical or accounting dispute. If, as we contend, the credits are to be included as a matter of law, then this item of expense was overstated by $24,207, since the correctness of that figure was not challenged in any respect.

The question of whether or not a charge to one railroad for the joint use of the railroad facilities of another should be based upon a reasonable sharing of actual cost and fixed charges is a question of law and does not involve any factual determination.

It is especially significant to note that the New Haven recognized the soundness of the legal principle that the reasonableness of the amounts paid for the use of Grand Central Terminal and the Harlem tracks must be established in a rate proceeding, independently of the provisions of the contracts or the amounts paid pursuant thereto, before any charge for such expenses may be considered and allowed (Case 1856, Report of New York Public Service Commission, Vol. 1, 1925, p. 214). In that commutation fare case the New Haven contended, in regard to Grand Central Terminal and Harlem toll expense, that:

> "The reasonable expense of conducting the particular service is not that expense which is fixed by the terms of any contract, but is that expense which is reasonable in fact" (p. 216).

In respect to the issue in regard to the use of the group method instead of the train-by-train method, it is our position that the mere circumstance that the New Haven presented cost evidence based upon the group method is insufficient to establish that it is a proper method. The mere fact that the New Haven uses the group method is not substantial evidence to support a finding that it is a proper method especially in the light of the proof that the group method was erroneous and was so recognized by the New Haven itself in a prior proceeding (Exhibit 40 in the Interstate Commerce Commission proceeding, received in the District Court as a part of Exhibit 3).

> *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 689, *cert. den.* 338 U. S. 860.

5. The Federal Commission, instead of resolving each of the conflicting claims between the railroad and the State Commission, reached by some unascertainable method the conclusion that was in substance an unsupported compromise between the two. The District Court used the substantial evidence rule to rationalize its affirmance of the Federal Commission's decision. In so doing, without reviewing the evidence in the record contrary to that submitted by the railroad, it misapplied the substantial evidence rule. By its affirmance of the District Court's decision, this Court acted in conflict with its recent decision in *Universal Camera Corp.* v. *National Labor Relations Board* (1950), 340 U. S. 474, 488.

6. In support of this motion for rehearing the Commission resubmits the brief originally submitted in opposition to the motion to affirm. The brief is submitted without change, except for the correction of two items. They are at page 3, line 5, where the word "are" should obviously have been "were", and at page 4, line 11, where the words "general passenger service of the" should be inserted at the end of the line. If, as it might be if taken out of context, the uncorrected sentence on page 4 was read by this Court as a concession that the entire operations of the railroad (including freight) resulted in a deficit, it would be misleading because such a deficit occurred in only one of the three years under consideration. The railroad earned a return on book investment less depreciation as follows: 1947—1.21%; 1948—2.72%; 1949 (10 months)—1.79%.

7. Under the *per curiam* decision, we have no means of knowing the basis upon which the majority of the Court granted the motion to affirm. We respectfully submit that there is no basis upon which it could be found that the decision of the Court below was so clearly correct that the appeal is without reasonable justification and taken merely for delay. *Cf. Eichel* v. *United States Fidelity, etc. Co.*, 245 U. S. 102; *Evans* v. *Brown*, 109 U. S. 180. The appeal was taken in good faith and in the earnest conviction that the judgment of the Court below should be reversed. Under all of the circumstances and particularly in view of the public interests involved we respectfully submit that the case presents substantial questions which should be reviewed by this Court after hearing upon the merits.

WHEREFORE, Petitioners-Appellants respectfully request and urge that this Court grant rehearing and reconsideration of the order of November 26, 1951 herein; that said

order be vacated and that the Court retain the case for hearing on the merits in regular course.

Dated: Albany, New York, December 10, 1951.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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No. 346. NEW YORK ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of New York. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE BLACK dissents to the action of the Court disposing of the case without oral argument. Dissenting memorandum filed by MR. JUSTICE DOUGLAS. *Nathaniel L. Goldstein*, Attorney General of New York, *Lawrence E. Walsh* and *George H. Kenny* for appellants. *Solicitor General Perlman* and *J. Stanley Payne* for appellees. Reported below: 98 F. Supp. 855.

MR. JUSTICE DOUGLAS, dissenting.

The Interstate Commerce Commission has ordered intrastate commuters' fares of the New York, New Haven and Hartford Railroad Company increased in New York to the level of interstate commuters' fares. The Commission found that the transportation conditions surrounding intrastate trains were substantially similar to those surrounding interstate trains. Interstate fares were determined to be reasonable. But present intrastate fares were found not to be producing a reasonable return on investment. The Commission concluded that persons and localities in interstate commerce, and interstate commerce, were being unduly discriminated against. Pursuant to § 13 (4) of the Interstate Commerce Act (49 U. S. C. § 13 (4)), it ordered intrastate fares raised to the level of interstate fares to remove the discrimination. A three-judge district court affirmed the order of the Commission as to the finding of discrimination against interstate commerce, but did not pass on the finding of discrimination against persons and localities in interstate commerce. 98 F. Supp. 855.

We have long insisted that the Interstate Commerce Commission supply us with an adequate basis for its decision. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504–505, 510–511; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 488–489. When, as here, Commission action constitutes an intrusion on state power, there is a duty on that body clearly to justify its action. *Florida* v. *United States*, 282 U. S. 194, 211–212; *Yonkers* v. *United States*, 320 U. S. 685, 690.

To justify its conclusion of discrimination against interstate commerce, the Commission must show that intrastate commutation service is not producing its fair share of the New Haven's revenues. *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 585–586; *United States* v. *Louisiana*, 290 U. S. 70, 75. Intrastate traffic must, of course, bear a proportionate amount of the burden necessary to meet maintenance and operating costs and yield a fair return on investment. But here, as in *North Carolina* v. *United States*, 325 U. S. 507, 516, the "Commission made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income." It merely found that the interstate rates were reasonable and fixed intrastate rates at the same level.

We have here no finding as to the necessary relation between interstate and intrastate commutation rates. Perhaps intrastate fares need not be as high as interstate fares to produce intrastate's fair share of total revenue. Perhaps they should be higher. The critical issue is at what rates the two types of commuter traffic will be capable of producing their proper shares of revenue. It is not necessary on this record to equate the two rates in order to prevent diversion of traffic to the lower intrastate fare. *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 485. An adequate basis for a conclusion of rate discrimination in this case would require a finding as to the

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amount of revenue expected of the intrastate and interstate commuters and the revenue-producing capacities of the two groups.

Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty. This case is perhaps insignificant in the annals. But the standard set for men of good will is even more useful to the venal.

No. 418. WEBERMAN *v.* AUSTER: and